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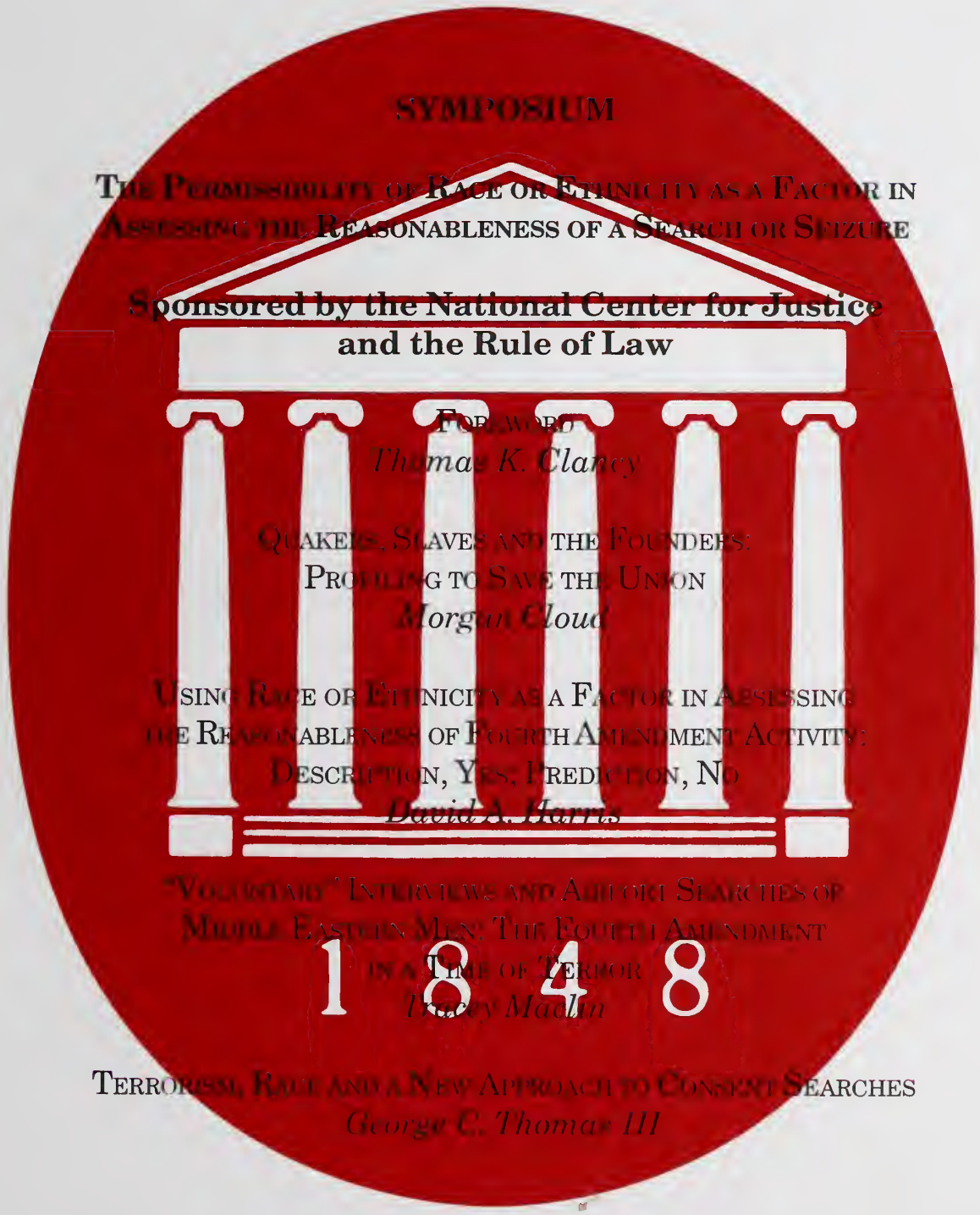
SYMPOSIUM
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Sponsored by the National Center for Justice and the Rule of Law
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David A. Harris
"VOLUNTARY" INTERVIEWS AND AIRPORT SEARCHES OF MIDDLE EASTERN MEN: THE FOURTH AMENDMENT IN A TIME OF TERROR
Tracey Maclin
1848
TERRORISM, RACE AND A NEW APPROACH TO CONSENT SEARCHES
George C. Thomas III

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The National Center for Justice and the Rule of Law is a part of the University of Mississippi School of Law. The Center focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity, and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs, and publications that examine important criminal law and procedural issues.

Thomas K. Clancy
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TABLE OF CONTENTS

SYMPOSIUM: THE PERMISSIBILITY OF RACE OR ETHNICITY AS A FACTOR IN ASSESSING THE REASONABLENESS OF A SEARCH OR SEIZURE

Sponsored by the National Center for Justice and the Rule of Law

FOREWORD ..... *Thomas K. Clancy* 365

ARTICLES

QUAKERS, SLAVES AND THE FOUNDERS: PROFILING TO SAVE THE UNION ..... *Morgan Cloud* 369

USING RACE OR ETHNICITY AS A FACTOR IN ASSESSING THE REASONABLENESS OF FOURTH AMENDMENT ACTIVITY: DESCRIPTION, YES; PREDICTION, NO ..... *David A. Harris* 423

"VOLUNTARY" INTERVIEWS AND AIRPORT SEARCHES OF MIDDLE EASTERN MEN: THE FOURTH AMENDMENT IN A TIME OF TERROR ..... *Tracey Maclin* 471

TERRORISM, RACE AND A NEW APPROACH TO CONSENT SEARCHES ..... *George C. Thomas III* 525

FOREWORD

Symposium: The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law[1] at the University of Mississippi School of Law focuses on issues relating to the criminal justice system, and its purpose is to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs and publications that examine important criminal law and procedural issues.

In furtherance of that mission, the Center has created the *Fourth Amendment Initiative*. Perhaps no other Amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very

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[*] Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law. J.D., Vermont Law School; B.A., University of Notre Dame

[1] The National Center for Justice and the Rule of Law at the University of Mississippi School of Law is supported by Grant No. 2000-DD-VX-0032, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention and the Office of Victims of Crime. Points of view or opinions in the articles produced for this symposium are those of the author and do not represent the official position of the United States Department of Justice.

complicated area of jurisprudence. Many law enforcement officers are undertrained, and prosecutors, defense attorneys and judges often have limited knowledge of the law. The legal landscape is constantly changing as a result of new technology and court decisions. Yet there is little or no continuing search and seizure training for professionals in the criminal justice system.

The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

On February 12, 2003, the Center held its second annual conference entitled, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure*. The Center believes that that conference, and the insightful articles published in this special edition of the *Mississippi Law Journal* stemming from the presentations at the conference, significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center and I wish to thank the leading legal scholars who participated in the symposium.

Scholars presenting papers were Professor A. Morgan Cloud of Emory University School of Law, Professor David A. Harris of the University of Toledo College of Law, Professor Tracey Maclin of Boston University School of Law and Professor George C. Thomas III of Rutgers, The State University of New Jersey, Center for Law and Justice.

The use of race or ethnicity by law enforcement officials in deciding which persons to search or seize predates the adoption of the Constitution and continues to this day. There are persistent problems with such practices and some uses of race are clearly unconstitutional. But are there any situations where race can be permissibly used as *a* factor—perhaps one of many— to justify a search or seizure of a person?

Some uses of race raise few or no legitimate concerns.

When the victim of a robbery describes the robber as white, black, dark-skinned or of Asian background, most commentators and courts agree that race and ethnicity are patently permissible to utilize in a police investigation—they are merely descriptive of the suspect of a completed crime.

Other uses of race are clearly impermissible. The selective enforcement of traffic laws by an officer on the basis of the violator's race is widely condemned as intentional racial discrimination. Such targeting of persons *solely* on the basis of their race is intolerable.

Some allegations of the unacceptable use of race are simply ignored—at least by the Supreme Court—where there is an objective basis for the search or seizure. Thus, according to the Court, a traffic stop *is* justified when a traffic violation has occurred, even though the officer is motivated in part to investigate another crime for which justification is lacking.

There are other situations where there is a fundamental lack of consensus. What about the situation where law enforcement officials have a strong basis for belief that the persons engaged in the criminal behavior fall disproportionally into a particular racial or ethnic group? Assume the following to be true: white males are disproportionally engaged in the illegal methamphetamine manufacturing business; black males at inner city high-drug corners are disproportionally engaged in the street-level distribution of drugs and whites who enter such areas are there to purchase drugs; the terrorist attacks of September 11, 2001, were perpetrated by men who are part of an organization of Islamic extremists of Middle Eastern origin; the Mafia is largely composed of men of Italian background; large numbers of Hispanics have illegally entered the United States through the border with Mexico. Should the race or ethnicity of the person be *a* permissible factor under such circumstances?

But are the above assumptions factually accurate? How strong a showing of a relationship between race or ethnicity and the criminal behavior must be established before it can be said that reliance on that factor is justified?

Does the type of crime matter in assessing the reasonableness of such use: should only acts of terrorism or

mass destruction warrant the use of race or ethnicity? Or is any crime sufficient?

Does it matter that there is an identified organization composed primarily of a particular racial or ethnic group that is conducting on-going conspiratorial activities?

Does it matter whether the law enforcement agency has a standardized policy—a profile—or should individual law enforcement officials be allowed to rely on their own experiences?

The symposium and the articles that resulted from the presentations addressed these and related topics, providing insight into the proper analytical structure that should be employed to reconcile the needs of law enforcement with the constitutional rights of individuals.

The symposium was held on the campus of the University of Mississippi at the School of Law. Doctor Robert C. Khayat, Chancellor of the University, in his introductory remarks at the symposium, spoke about the University's commemoration of the fortieth anniversary of the integration of Ole Miss. On September 30, 1962, rioting engulfed the University of Mississippi campus when federal officials accompanied James Meredith, a black man, for admission as a student at the then all-white university. The resulting violence took the lives of two men and wounded many others. Forty years later, the University of Mississippi has recalled those events and the subsequent integration of the University with a year-long observance entitled, *Open Doors*. "As the oldest public university in Mississippi, it has been our good fortune to lead the way in a number of important areas," Chancellor Khayat said. "Although the events of 1962 are painful and regrettable, we have built on that experience and have incorporated into the culture of Ole Miss the basic value of respect for the dignity of every individual."

QUAKERS, SLAVES AND THE FOUNDERS: PROFILING TO SAVE THE UNION

Morgan Cloud[*]

I. INTRODUCTION

Racial and religious profiling is inconsistent with a fundamental tenet of Fourth Amendment doctrine. In most circumstances, law enforcers must possess fact-based, particularized suspicion before they seize or search a person or property.[1] The inconsistency between the constitutional requirement of individualized suspicion and reliance on group identity to justify seizures and searches is accentuated by the Justice Department's recently published definition of profiling:

> "Racial profiling" at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.[2]

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[*] Charles Howard Candler Professor of Law, Emory University. This paper was commissioned and underwritten by funds from the National Center for Justice and the Rule of Law at the University of Mississippi School of Law (National Center), which is supported by a grant from the Office of Justice Programs at the United States Department of Justice (2000-DD-VX-0032). An earlier version of the article was presented at a symposium sponsored by the National Center and held at the University of Mississippi School of Law on February 21, 2003. I thank Tom Clancy, Kathleen Cleaver, Michael Perry, John Witte and the symposium participants for their comments, criticisms and suggestions.

[1] For the leading critique of the role of fact-based suspicion, see Thomas Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures,* 25 U. MEM. L. REV. 483 (1995).

[2] Civil Rights Div., U.S. Dep't of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003) [hereinafter Guidance], *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

If the Constitution requires fact-based, individualized suspicion to justify seizures and searches, it is easy to understand the Justice Department's position that, without more, a person's race, religion, ethnicity or alienage cannot supply the factual basis for a constitutional search or seizure. No logical relationship exists between any of these characteristics and the commission of crimes.

Yet searches and seizures based upon these impermissible grounds occur, and the phenomenon is not new. Constitutional history provides provocative examples of racial and religious profiling in every century of the nation's existence. Group profiling did not originate with the well-known examples from the first half of the twentieth century: the incarceration of Japanese Americans during World War II and the "Palmer raids" directed against European immigrants two decades earlier. The examples of "profiling" discussed in this article originated with the Founders.[3]

The first example occurred during the Revolutionary War, when the Congress authorized the seizure and lengthy incarceration of Quakers suspected of being British sympathizers precisely because they were Quakers. These individuals were seized without any showing that in fact they were in fact aiding or even supporting the enemy, and no hearing was ever held (either before, during or after the incarceration) to determine the validity of these seizures. Even more remarkably, twenty of the seized men were "exiled" to Virginia, where the group was held captive for almost eight months. The captivity ended, in part because the immediate crisis had ended, in part because of incessant agitation by the captives, their families, friends and supporters and in part because many leaders on the American side worried about the long term consequences of allowing seizures without proper justification. The relatively sparse historical record of these events demonstrates that the principals—including John Adams and other leaders of the new government—recognized that these seizures could be justified

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[3] The term "profiling," of course, was not used by the Founders.

only by the exigencies of war.[4]

The second example—laws justifying the seizure of people alleged to be runaway slaves—is more complex in its origins and scope. It originated with the political compromises that preserved slavery in the original constitutional scheme, compromises justified by the exigencies of the time and the hazards of nation building. The Framers included the Fugitive Slave Clause in Article IV of the Constitution,[5] and soon acted to implement it with legislation. The Second Congress enacted the Fugitive Slave Act of 1793, which ostensibly ensured that slave owners could recover their human property.[6] In practice, the effort to recover fugitive slaves generated the crudest forms of what today we would label as racial profiling.[7] Opposition to slavery, coupled with fears that the crude standards of proof employed by slave catchers led to the enslavement of free blacks living in Northern and border states, produced resistance to enforcement of the federal law.

One by-product of this resistance was the Fugitive Slave Act of 1850—an even more odious statute that was an essential element of the Compromise of 1850, the historic congressional attempt to resolve with political means the intractable national crises flowing from slavery.[8] Supporters of slavery, and many opponents as well, asserted that the nation's very survival depended upon effective federal legislation enforcing the rights of slave owners to recapture runaway slaves.[9] The 1850 statute was necessary, they argued, to preserve the United States from dissolution, and perhaps from civil war.[10]

Both the seizure of Quakers during the Revolution and the enforcement of laws permitting seizures of blacks alleged to be runaway slaves were justified as necessary responses to threats to the very existence of the nation.[11] As a result, these early

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[4] *See* discussion *infra* Part II.
[5] U.S. CONST. art. IV, § 2, cl. 3.
[6] *See infra* notes 100-31 and accompanying text.
[7] *See* discussion *infra* Part III.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

examples of what we would label today as religious or racial profiling have implications for the current debate about profiling in the "war on terror."

The September 11, 2001 terrorist attacks resurrected religious and racial profiling from the scrapheap of discredited constitutional doctrines to which it had only recently been discarded. On the eve of September 11, a broad consensus had emerged in the United States that racial profiling was both morally wrong and ineffective as a law enforcement technique.[12] One measure of the scope of this consensus is that only weeks after his inauguration, President Bush attacked racial profiling in an address before a joint session of Congress. His position was straightforward: racial profiling by law enforcement officials is "wrong and we will end it in America."[13]

This critique of racial profiling focused upon traditional enforcement of the criminal and traffic laws. September 11 changed that focus. In the wake of the mass murders committed by Islamic terrorists from the Middle East, the almost universal condemnation of racial profiling fragmented, and the Bush Administration (and others) argued in favor of the use of profiling to combat terrorism.[14]

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[12] Guidance, *supra* note 2; *see* David Chen, *Westchester Executive Urges Law Banning Racial Profiling*, N.Y. TIMES, May 10, 2001, at B6 (discussing the legislative debate in Westchester County to ban racial profiling to avoid issues that arose from the use of this police tactic in New Jersey); Lori Montgomery, *Racial Profiling in Maryland Defies Definition*, WASH. POST, May 16, 2001, at A1 ("Since 1999, 10 states including Maryland have enacted laws requiring data collection [to find evidence of racial profiling]; three more passed laws to eliminate racial profiling."); Solomon Moore, *Race Profiling Suit Challenges CHP's Tactics,* L.A. TIMES, May 28, 2001, at B1 (discussing a class action suit in which police are being accused of using racial profiling as a mechanism to stop drug trafficking; also discussing the increase in racial profiling suits in various other states); Maria Newman, *400 Protest Racial Profiling, but Few Top Officials Hear*, N.Y. TIMES, May 17, 2001, at B5 (reporting a rally at the State House in New Jersey protesting racial profiling by police).

[13] *See, e.g.*, Guidance, *supra* note 2.

[14] *See* Mark Z. Barabak, *America Attacked*, L.A. TIMES, Sept. 16, 2001, at A1 (citing U.S. poll in which sixty-eight percent of the people questioned supported "allowing law enforcement to randomly stop people who may fit the profile of suspected terrorists"); Maura Dolan, *Terrorism May Shift Jurors' Attitudes*, L.A. TIMES, Oct. 19, 2001, at B2 (stating that "[o]nce-promising civil rights lawsuits over racial profiling no longer look so promising" after the events of 9/11); Wil-

The new Justice Department guidelines on racial profiling implement seemingly contradictory positions by prohibiting profiling in some contexts but encouraging its use in the "war against terror." The guidelines prohibit racial profiling for federal officials engaged in "traditional law enforcement" activities, but "do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders."[15] When federal law enforcement officers are "investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders," they may consider both race and ethnicity "to the extent permitted by the Constitution and laws of the United States."[16] The Justice Department asserts that because the terrorist threat to the nation's security is so great even the rigorous strict scrutiny standard of constitutional review permits the use of race, ethnicity or alienage to fight terrorism.[17]

This is functionally the same argument used to justify the "profiling" of Quakers and runaway slaves at the Founding and during the succeeding decades. In this article, I draw several broad lessons from these early and seminal examples of reli-

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liam Glaberson, *Racial Profiling May Get Wider Approval by Courts*, N.Y. TIMES, Sept. 21, 2001, at A16 (stating that more judges may authorize racial profiling after events of 9/11); Serge F. Kovaleski, *A Wide, Aggressive Probe Collides with Civil Rights; Innocent People May Face Questioning, Experts Say*, WASH. POST, Sept. 15, 2001, at A14 (quoting various terrorism experts who say that racial profiling is necessary to "narrow the pool of suspects"); Norah Vincent, *Commentary; Whining and Wailing Won't Win a War*, L.A. TIMES, Nov. 1, 2001, at B13 (commenting that racial profiling of Arab-American men on flights is a "necessary and rational precaution").

[15] *See, e.g.*, Guidance, *supra* note 2.

[16] *See id.*

[17] *See id.* (citing decisions by the Supreme Court and the lower federal courts establishing that the impermissible use of race or religion as considerations in law enforcement decisions violates equal protection rights and that all racial classifications must be measured against the strict scrutiny standard, but also asserting that "the legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand").

gious and racial "profiling." Two lessons seem particularly relevant to our current situation. First, to paraphrase a bumper sticker, "profiling happens." The use of "profiling" during crises dating from the time of the nation's creation confirms that during a military or political crisis discrete groups who can be linked to the crisis are likely to be subjected to discriminatory law enforcement techniques—including seizures that do not satisfy normal legal or constitutional norms. Second, both eamples of "profile"-based seizures were ultimately ended in part because members of the affected groups and their supporters objected and in some instances resisted. If the first conclusion suggests a rather fatalistic response to profiling in times of crisis, the second contains important lessons for how the polity should respond to those who oppose discriminatory government profiling in the midst of crises.

For if history teaches that in the midst of crises—when the future course of events remains unknown—those charged with preserving the nation will resort to drastic tactics unacceptable in more placid and tranquil times, then it also teaches that opposition to these tactics is essential if democratic values and mechanisms are to survive the crises. Those arguing in favor of abstractions like liberty and freedom are unlikely to prevail with a populace facing more concrete threats, like invading armies, civil war or weapons of mass destruction. But the struggle to define and enforce our constitutional norms is an ongoing process, and that process is aided by, and may depend upon, the actions of those who resist expansion of government power at the very time when it seems to be most needed. The first historical example demonstrates that the nature of the crisis affects how "profile"-based seizures are used, but also how vocal and persistent opposition may affect the course of government conduct.

II. THE VIRGINIA EXILES

The war did not go well for the American rebels during much of 1777. By late August, Philadelphia—the largest city in the thirteen states, the capital of Pennsylvania and the home of Congress—was threatened by an imminent military invasion by

the British army.[18] When Congress received documents suggesting that a meeting of Quakers in Spanktown, New Jersey (Spanktown papers) might be spying for the British,[19] it referred the matter to a committee of three, which included John Adams and Richard Henry Lee.[20] That committee reported to Congress that since the beginning of the war the "conduct and conversation" of a number of Quakers demonstrated that they were "disaffected to the American cause," and were inclined "to communicate intelligence to the enemy, and in various other ways to injure the counsels and arms of America."[21]

Congress approved two resolutions proposed by the committee. The first "earnestly recommended to the Supreme Executive Council of the State of Pennsylvania" (Council) that it seize eleven Quakers named in the report, "together with all such papers in their possession as may be of a political nature."[22] The only specific fact cited by Congress in support of this recommendation was a single "seditious publication," dated December of 1776, and signed by a prominent Philadelphia Quaker, John Pemberton.[23] The second resolution recommend-

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[18] By late August 1977, General Howe's troops had sailed into the Chesapeake Bay and landed in Maryland and were marching upon Philadelphia. For an account of the military campaign written by a member of the revolutionary generation, see 2 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 342-56, 411-12 (Lester H. Cohen ed., 1990).

[19] In late August, General Sullivan sent documents to Congress that allegedly were seized from a British agent. *See* Letter from General Sullivan to Congress (Aug. 25, 1777), *reprinted in* THOMAS GILPIN, EXILES IN VIRGINIA 61-63, 118-19 (1848). These papers contained information about troop strength, movements and other military information. The source of these documents allegedly was a Quaker meeting in Spanktown, New Jersey. The validity of these documents is open to question. The Spanktown Quaker meeting may not have even existed, and the documents appear to be dated before some of the reported events had occurred. *See* ARTHUR J. MCKEEL, THE RELATION OF THE QUAKERS TO THE AMERICAN REVOLUTION 178 (1979). Whether legitimate or fraudulent, these documents served as the catalyst for the subsequent actions by Congress and the Pennsylvania authorities.

[20] Congressional Report (Aug. 28, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 261.

[21] *Id.*

[22] *Id.*, *reprinted in* GILPIN, *supra* note 19, app. at 262. Delaware was included in this initial recommendation.

[23] *Id.*

ed that the other states "apprehend and secure all persons, as well among the people called Quakers as others, who have in their general conduct and conversation evidenced a disposition inimical to the cause of America . . . ."[24] Congress cited no facts, evidence or proof justifying the proposed seizure of any individuals by the other states.

The absence of proof, or even specific allegations, of conduct supporting the British was particularly significant in the context of the Quaker religion's doctrine on war. Many Quakers refused to support the American war effort, and many were at least sympathetic to the British cause.[25] There can be little doubt that some Quakers opposed the Revolution because it threatened their economic and political self-interest.[26] But there also can be no doubt that, for many, opposition to the hostilities derived from a commitment to pacifism rooted in religious doctrine that militated against active support for either side in the war.[27] Failure to support the American mili-

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[24] *Id.*, *reprinted in* GILPIN, *supra* note 19, app. at 262.

[25] The response of Quakers to the hostilities was far from uniform. A small number of Quakers fought on the American side. *See* 2 RAMSAY, *supra* note 18, at 628. On occasion, Quakers cared for injured or wounded combatants. On the other hand, Philadelphia Quakers refused to provide supplies, such as blankets, for use by the American army. *See, e.g.*, Letter from Philip Schuyler to John Pemberton (May 17, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 89-90 (Paul H. Smith ed., 1981); Letter from Philip Schuyler to George Washington (May 18, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra*, at 90.

[26] *See infra* note 45 and accompanying text. Criticism of the Quakers' material success was not uncommon in the 1770s. For example, on the eve of the Revolution, the committeemen of the Pennsylvania Assembly issued a petition stating "that People *sincerely* and *religiously* scrupulous are but few in Comparison to those who upon this Occasion, as well as others, make *Conscience a Convenience*" and "[a] very considerable Share of the Property of this Province is in the Hands of People professing to be of tender Conscience in military Matters." JACK D. MARIETTA, THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783, at 227 (1984).

[27] The Pennsylvania Constitution adopted in September 1776 provided expansive protection for the exercise of religious beliefs:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . [n]or can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments . . . [a]nd that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case

tary effort did not necessarily translate into active support for the British.

This idea was rejected by supporters of the seizures, who accused the Quakers of hypocritically hiding their support of the King behind claims of Christian doctrine.[28] For example, General Sullivan condemned Quakers in his letter conveying the Spanktown Papers to Congress: "The paper Referred to puts it beyond Doubt . . . That those people under pretence of worshipping the Deity Employ their time in Collecting Intelligence for the Enemy . . . being always Covered with that Hypocritical Cloak of Religion under which they have with Impunity So Long Acted . . . ."[29]

By August 31, 1777, Congress had conveyed its recommendations to the Pennsylvania Council, which quickly appointed twenty-five men, "together with such other persons as they shall call to their assistance,"[30] to arrest "such persons as are deemed inimical to the cause of American liberty."[31] The Council's order expanded to forty-one the number of individuals

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interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

PENN. CONST. of 1776, Declaration of Rights, art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS 3082 (Francis Newton Thorpe ed., 1909).

[28] *See, e.g.,* Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 614 ("The calling God who is the fountain of truth, or the quoting his Holy Scriptures, which are the Oracles of Truth, to witness a Lie, or any Species of deceit is blasphemy. And to such men as we have in view it may very fairly be retorted 'they wrest the holy Scriptures to their own damnation.'").

[29] Letter from John Sullivan to John Hancock (Aug. 25, 1777), *in* 1 LETTERS AND PAPERS OF MAJOR-GENERAL JOHN SULLIVAN, CONTINENTAL ARMY 443-44 (1930).

[30] Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Sept. 1, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 263. In this passage, the council's order, dated September 1, 1777, seems equivalent to the hated writs of assistance employed by British law enforcers in the decades leading up to the Revolution. Those writs permitted private citizens who enlisted to assist in enforcement of the writs. *See, e.g.*, M.H. SMITH, THE WRITS OF ASSISTANCE CASE 29 (1978) ("It was not new in England that a generality of persons, public and private alike, should be obligated to assist in the enforcement of law and the promotion of good order.").

[31] Pennsylvania Council, *supra* note 30, *reprinted in* GILPIN, *supra* note 19, app. at 263.

identified for seizure but also failed to specify instances of wrongdoing or present evidence supporting the charges of disloyalty. Exercising a level of discretion that today would be labeled as arbitrary, the Council's agents seized people they suspected of being British sympathizers and incarcerated them in Philadelphia's Mason's Lodge.[32]

The arrestees immediately sent the Pennsylvania Council and the Congress a series of written protests that they called remonstrances, in which they argued that their seizures violated both their natural rights and rights protected by the Pennsylvania state constitution, which had been adopted only twelve months earlier.[33] Of particular relevance here, Section X of the Pennsylvania Constitution's Declaration of Rights limited searches and seizures in language that foreshadowed the Fourth Amendment:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.[34]

The captives argued vehemently that the Council's order violated the natural rights of "freemen"[35] and was a "general

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[32] Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Sept. 2, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 264 (describing searches and seizures in "official" reports).

[33] *See infra* notes 35-37 and accompanying text.

[34] PENN. CONST. of 1776, Declaration of Rights, art. X, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 27, at 3083.

[35] This analysis found consistent rights and rules in the new state constitution, natural law, English common law and tradition:

> We apprehend that no man can be lawfully deprived of his liberty without a warrant from some persons having competent authority, specifying an offence against the laws of the land, supported by oath or affirmation of the accusers, and limiting the time of his imprisonment, until he is heard, or legally discharged, unless the party be found in the actual perpetration of a crime. Natural justice, equally with law, declares that the party accused should know what he is to answer to, and have an oppor-

warrant"[36] expressly prohibited by the new Pennsylvania Constitution from which the Council "derive[d] all your authority and power."[37] The order gave the "messengers" executing it "unprecedented . . . latitude," authorizing them "to search all papers belonging to us, upon a bare possibility that something political may be found, but without the least ground for a suspicion of the kind."[38] It required the seizure of Quakers' papers, "without limiting the search to any house or number of houses, under colour of which every house in the city might be broken open."[39] The order permitted indefinite detention "without interposing a judicial officer between the parties and the messenger."[40] The Quakers concluded (with a rhetorical flourish consistent with the hyperbolic political style common to the era) that the "warrant . . . [was] a more flagrant violation of every right which is dear to freemen, than any act which is to be found in the records of the English Constitution."[41]

No student of the history of English searches and seizures would be likely to agree that the Council's order was as unique as the Quakers claimed, but the order did contain terms likely

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tunity of showing his innocence.

Letter from Arrestees at Philadelphia Freemasons' Lodge to the President and Council of Pennsylvania (Sept. 4, 1777), *reprinted in* GILPIN, *supra* note 19, at 78 (citing both sections IX and X of the state constitution in a remonstrance).

[36] The captives' correspondence and petitions make the same points repeatedly. The order authorizing their seizure was

> a general warrant, specifying no manner of offence against us, appointing no authority to hear and judge whether we were guilty or innocent, nor limiting any duration to our confinement. Nor was this extraordinary warrant more exceptionable in these respects, than in the powers given to the messengers to break and search not only our own, but all the houses their heated imaginations might lead them to suspect.

Arrestees at Philadelphia Freemasons' Lodge, An Address to the Inhabitants of Pennsylvania (1777) [hereinafter Address to Inhabitants], *reprinted in* GILPIN, *supra* note 19, at 88.

[37] Letter from Israel Pemberton, John Hunt and Samuel Pleasants to the President and Council of Pennsylvania (Sept. 4, 1777), *reprinted in* GILPIN, *supra* note 19, at 75.

[38] Letter from Arrestees at Philadelphia Freemasons' Lodge, *supra* note 35, *reprinted in* GILPIN, *supra* note 19, at 79.

[39] *Id.*

[40] *Id.*, *reprinted in* GILPIN, *supra* note 19, at 79-80.

[41] *Id.*

to strike the contemporary reader as unusual.[42] In response to the early remonstrances from the captives, and at the urging of Congress, the Pennsylvania Council gave a majority but not all of the Quakers the opportunity to avoid formal seizure by swearing an oath of loyalty to Pennsylvania and agreeing to confine themselves voluntarily in their homes and promising not to correspond with the enemy.[43] A number of Quakers complied with these conditions and were released or exempted from captivity, reducing the population of prisoners to twenty.[44]

If this appears to be special treatment, it was. Many of those in custody were prominent and influential not only within the Quaker community, but also within the larger world of Pennsylvania business and politics. Congress recognized that these were not ordinary criminals to be tossed into a Pennsylvania prison.[45] In its initial recommendation that the Pennsyl-

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[42] The most comprehensive history of the subject remains William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

[43] Letter from T. Matlack, Secretary, to the Inhabitants of Pennsylvania (Sept. 9, 1777), *reprinted in* GILPIN, *supra* note 19, at 111-12. The oath or affirmation prepared by the council stated: "I do swear (or affirm) that I will be faithful and bear true allegiance to the Commonwealth of Pennsylvania, as a free and independent State." Letter from Timothy Matlack, Secretary, to William Bradford (Sept. 5, 1777), *reprinted in* GILPIN, *supra* note 19, at 85.

[44] Seventeen were Quakers, three were not. Congressional Resolution (Sept. 8, 1777), *reprinted in* GILPIN, *supra* note 19, at 42.

[45] Before the Quakers reformed the Pennsylvania prison system, prisons were overcrowded, all prisoners were indiscriminately housed in the same rooms (i.e., there was no separation between the sexes or between different types of criminals) and alcohol was freely sold. In 1788, the Society of Friends sent an account to the Pennsylvania legislature detailing these defects in the prison system and advocating, most importantly, "solitary confinement [and] hard labour." HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 86-87 (1968). In their reforms,

> [t]he Friends introduced rigid severity into the prison for those who had forfeited the right to benevolent clemency. Just as mildness was to be a persuasive factor in the reform of the budding criminal, so was drastic solitary confinement to deter by its rigors the dense and calloused malefactor from further crime.

ORLANDO F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, at 38 (Patterson Smith 1967) (1922). The Quakers developed the Walnut Street Jail in 1795, which was a reformed prison system that espoused the Quaker imprisonment ideals. In advocating this system, the Society of Friends

vania authorities seize Quakers, Congress resolved "that the persons so seized be confined in such places and treated in such manner as shall be consistent with their respective characters and the security of their persons."[46] Similarly, although the Pennsylvania Council viewed their task as arresting "persons dangerous to the state,"[47] the Pennsylvania authorities also concurred that people of the detainees' social status deserved extra considerations: "Congress recommends it, and we wish to treat men of reputation with as much tenderness as the security of their persons and papers will admit. . . . [the] Council would not without necessity commit many of the persons to the common jail or even to the state prison."[48]

Here we discover one of the profound differences between the "profiling" of these Quakers and profiling observed in later cases. These men were not members of a minority of the weak and disenfranchised. These men were prominent in the business, political and religious lives of the new nation's leading city.

This prominence should not, however, be confused with universal popularity. The correspondence from several members of Congress reveals an anti-Quaker animus that appears, at least in some instances, to reflect prejudice against the group. The letters of two of the leading revolutionaries, who also were members of the committee of three appointed by Congress to determine whether Philadelphia Quakers should be seized, are revealing. An example of the more vitriolic language maligning Quakers appears in a letter from John Adams to his wife, Abigail:

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urged the Legislature that "solitary confinement to hard labor and a total abstinence from spirituous liquors will prove the means of reforming these unhappy creatures." BLAKE MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 5-6 (Patterson Smith 1968) (1936).

[46] Congressional Report (Aug. 28, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 262.

[47] Pennsylvania Council, *supra* note 30, *reprinted in* GILPIN, *supra* note 19, app. at 263 (emphasis omitted).

[48] Pennsylvania Council, Order (Aug. 31, 1777), *reprinted in* GILPIN, *supra* note 19, at 72-73; *see also* Letter from Timothy Matlack, Secretary, to William Bradford (Sept. 4, 1777), *reprinted in* GILPIN, *supra* note 19, at 77; Address to Inhabitants, *supra* note 36, *reprinted in* GILPIN, *supra* note 19, at 90.

> You will see by the Papers inclosed, that We have been obliged to attempt to humble the Pride of some Jesuits who call themselves Quakers, but who love Money and Land better than Liberty or Religion. The Hypocrites are endeavouring to raise the Cry of Persecution, and to give this Matter a religious Turn, but they cant succeed. The World know them and their Communications. Actuated by a land jobbing Spirit, like that of William Penn, they have been soliciting Grants of immense Regions of Land on the Ohio. American Independence has disappointed them, which makes them hate it.[49]

In a letter to Patrick Henry, Richard Henry Lee's language was a bit more measured in tone, but its substance was as caustic:

> The Quaker m[otto] ought to be "Nos turba sumus" for if you attack one, the whole Society is roused. You will see by the inclosed *Testimonies* a uniform, fixed enmity to American measures, which with the universal ill fame of some capital persons, has occasioned the arrest of old Pemberton and several others, to prevent their mischievous interposition in favor of the enemy at this critical moment when the enemies army is on its way here . . . . They have taken infinite pains, according to custom, to move heaven and earth in their favor, and have transmitted copies of their indecent remonstrances over the Country. . . . This day Congress have proposed that the Quaker Tories should be sent forthwith to Stanton in Augusta, I hope you will have them well secured there for they are mischievous people.[50]

Whether deserved or not, Adams's and Lee's hostility towards the Philadelphia Quakers was palpable, and seems to exemplify the attitudes that would lead to "profiling" of a disliked religious minority during a time of crisis. Nonetheless, this was not a powerless minority like slaves or immigrants. The readiness, in some cases the eagerness, of leaders of the

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[49] Letter from John Adams to Abigail Adams (Sept. 8, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 627.

[50] Letter from Richard Henry Lee to Patrick Henry (Sept. 8, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 637.

national and state governments to seize men of social and economic significance without regard to accepted legal requirements only emphasizes how government can act against any minority identifiable with the adversary in times of crisis. Facing an extraordinary threat, the Founders were willing to employ extraordinary measures against powerful members of the larger society. That the government conduct was justified by the crisis is a theme repeated throughout the documentary record of these events.[51]

Congress's initial recommendation that the Pennsylvania Council seize Quakers, for example, began with an instrumentalist justification:

> Whereas the States of Pennsylvania and Delaware are threatened with an immediate invasion from a powerful army, who have already landed at the head of Chesapeake Bay; and whereas the principles of policy and self-preservation require that all persons who may reasonably be suspected of aiding or abetting the cause of the enemy may be prevented from pursuing measures injurious to the general weal . . . .[52]

Correspondence from members of Congress sounded the same theme. Henry Laurens of South Carolina defended the peremptory seizures: "If the Law of necessity will not justify us in the Act of confining notorious Enemies of the State when that State is actually invaded . . . ?"[53] James Lovell of Massachusetts argued that "the Safety of the Union called for it."[54] Not surprisingly, John Adams penned an emotional, yet eloquent, description of the crisis:

> The Moments are critical here. We know not, but the next will bring Us an Account of a general Engagement begun—and when once begun We know not how it will end, for the Battle is not always to the strong. The Events of War are

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[51] *See, e.g.*, GILPIN, *supra* note 19.

[52] Congressional Resolution (Aug. 25, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 259.

[53] Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 612-13.

[54] Letter from James Lovell to Joseph Trumbull (Sept. 7, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 625.

> uncertain. All that We can do is to pray, as I do most devoutly, that We may be victorious—at least that We may not be vanquished. But if it should be the Will of Heaven that our Army should be defeated, our Artillery lost, our best Generals kill'd, and Philadelphia fall into Mr. Howes Hands, still America is not conquered.[55]

Within days of their initial seizures, the twenty remaining captives were carried against their will out of Philadelphia to Virginia, where they were held in custody for nearly eight months. Throughout this extended captivity, the Quakers, along with family members and supporters, repeatedly petitioned Congress and the Pennsylvania Council for their release.[56] Over time, these pleas gained strength from three developments.

First, by spring 1778, General Howe had evacuated his troops from Philadelphia, where they had spent a more comfortable winter than the rebel army suffering at Valley Forge, and had begun his initial actions in the campaign of 1778. The military crisis used to justify the seizures had abated.

Second, two of the Quaker prisoners died while in captivity in Virginia. Both deaths occurred in March 1778, and within weeks the survivors were released. The first death resulted in part from the relative leniency of their captivity. While in Virginia, the exiles were not confined to a jail or prison. They were housed in private residences and, although suffering the indignity of being forced to pay for their own food and lodging,[57] the conditions of captivity were relatively civilized.[58] They

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[55] Letter from John Adams to Abigail Adams (Sept. 8, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 627.

[56] For examples of the persistent efforts by the prisoners, their families and their supporters to persuade Congress and the Council to order their release, see GILPIN, *supra* note 19, at 82-88, 125-26, 198-200, 209, 216, 221-23, 229-30, app. at 279-81.

[57] Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Apr. 6, 1778), *reprinted in* GILPIN, *supra* note 19, app. at 279 ("Ordered, That the whole expense of arresting and confining the prisoners sent to Virginia, the expenses of their journey, and all other incidental charges, be paid by the said prisoners." (emphasis omitted)).

[58] This did not preclude Quaker petitions complaining about the conditions of confinement. *See, e.g.,* The Journal of the Friends in Exile in Virginia (Nov. 2,

were allowed to receive and entertain visitors[59] and for much of their captivity were allowed to take long walks[60] and even ride horses in the neighboring countryside.[61]

While on a walk in early February 1778, Thomas Gilpin caught a cold from which he never recovered. His condition worsened for nearly a month, and he died on March 2, 1778. Gilpin's death added to the continuing pressure for release of the prisoners because their captivity now could be characterized as so inhumane that it had caused the death of a man held in custody on but flimsy charges and who had never been given a hearing on the charges or the legitimacy of his seizure. On March 16th, two weeks after Gilpin's death, Congress (which having fled Philadelphia itself was sitting in Yorktown) passed a resolution calling on the Pennsylvania Council to arrange for the release of the prisoners.

The Council did not act immediately, and another death occurred before the prisoners were freed. John Hunt suffered a disease that required amputation of his leg, a terrible procedure in a time before surgical anesthetics. The surgery took place on March 22nd, and he was dead by March 31st. By the second week of April 1778, the Council responded to continuing pressure, including Congress's resolution, and commenced the process by which the prisoners would be released.[62] On April 10, 1778, the Council "read and considered" a petition from the prisoners' relatives and friends written after Gilpin's death (but

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1777), *reprinted in* GILPIN, *supra* note 19, at 182 ("We have experienced great inconvenience at being very much crowded at our landlord's . . . ."). Many of the complaints had to do with the cost of being forced to pay for their own imprisonment. *Id.*

[59] *Id., reprinted in* GILPIN, *supra* note 19, at 175.

[60] *Id.*

[61] *Id.* Three of the original prisoners were not Quakers. In mid-February 1778, one of them, Thomas Pike, simply rode off from Winchester, presumably to return to Philadelphia. James Pemberton wrote a rather laconic account of the event: "In the evening, I had cause to suspect that Thomas Pike had eloped, having left us this morning under a pretence of going to Isaac Zane's ironworks, and were informed he did not go there." The Journal of the Friends in Exile in Virginia (Feb. 16, 1778), *reprinted in* GILPIN, *supra* note 19, at 208.

[62] Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Apr. 8, 1778), *reprinted in* GILPIN, *supra* note 19, at 218-19.

before they could have learned of Hunt's demise). The petition is representative of many of the pleas sent on the prisoners' behalf over the months of their captivity:

> We, the afflicted and sorrowful wives, parents, and near connexions of the Friends in banishment, at and near Winchester, think ourselves bound by the strongest ties of natural affection, sympathy, and regard, to request you, that you suffer Christian charity and compassion so far to prevail in your minds as to take off the bonds of those innocent and oppressed Friends, and entreat you not let the ruin of such . . . to lie at the door of a people professing the tender and compassionate religion of Christ . . . .
>
> The melancholy account we have lately received, of the indisposition of our beloved husbands and children, and that the awful messenger—death—had made an inroad on one of their number, (Thomas Gilpin,) to the unspeakable grief and irreparable loss of an amiable wife and children, hath deeply affected our minds, and divers of our families are in a distressed situation. We therefore ardently desire you to make the case your own. . . .[63]

One could understand if Congress and the Council were tempted to terminate the Quakers' captivity simply to obtain relief from these relentlessly verbose and self-righteous petitions. But there was another, more important, reason to release the prisoners. Once the crisis had abated and the imprisonment had become more distasteful with the deaths of the two Quakers,[64] objections to these incarcerations and the precedent they established became more effective than they had been earlier in the crisis. These objections had been raised not only by the captives' family and friends, but also by some political and military leaders. In some of them, one senses a concern that if government could subject these Quakers to lawless seizures,

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[63] Letter from the Prisoners' Relatives and Friends to the Congress, Board of War, President and Council, and Assembly of Pennsylvania (Apr. 10, 1778), *reprinted in* GILPIN, *supra* note 19, app. at 279-80.

[64] The captives themselves believed that it was "more than probable" that the two deaths helped prompt the political authorities to grant their relief. *See* The Journal of the Friends in Exile in Virginia (Apr. 13, 1778), *reprinted in* GILPIN, *supra* note 19, at 220.

then anyone—even members of Congress—could be next.

We have no transcripts of the congressional debate about the seizure of Quakers, but letters written by members reveal that objections were raised to the plan from the beginning. For example, only days after Congress approved the seizures recommended by its committee of three, Henry Laurens complained about the length of the congressional debate:

> Five hours debating one Silly point whether certain persons chiefly Quakers who have given the Strongest proofs which in these times can be expected of their avowed attachment to the cause of our Enemies, who have peremptorily refused to take an Oath or affirmation of Allegiance to the State or to give a parol to the Executive power, should have a hearing in their own defence.[65]

Congressman Lauren's position was clear. The evidence implicating the Quakers was sufficient in the context of the military crisis to cast the Quakers as enemies, so no hearing to judge the validity of the charges was necessary, and debating the issue was a waste of time. But it is evident that other members of Congress disagreed. In the midst of a military crisis they treated the question of the captives' legal rights as important enough to devote five precious hours to debating the issue. And that was not the end of the congressional debate.

In a letter written a week later, Congressman Henry Laurens stressed the time pressure facing Congress. "Genl Howe . . . must be stopped this night or tomorrow morning he will be on our Skirts. We are all now talking of adjourning to the Country."[66] Nonetheless, the previous day Congress again had spent hours debating the plan to incarcerate the Quakers and other "disaffected" people:

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[65] Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 612. It is reasonable to infer that the debate occurred on August 28, 1777, the day the committee of three's seizure recommendations were approved.

[66] Letter from Henry Laurens to John Lewis Gervais (Sept. 9, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 636. Congress did flee Philadelphia, eventually settling in Yorktown for much of its period of exile.

> It was mortifying to sit from 11 oClock to ½ past 6 without respite, spend four hours of that time wrangling a point which I think had employed us five days before . . . the business relative to the Quakers & other self disaffected, where it might have been ended & in the manner in which it ought to have been ended in five minutes from the very outset, by recommending to confine at an appointed place Stanton in Virginia, all the mischievous & active ones who shall refuse to take the Oath or affirmation of Allegiance to the State.[67]

Yet even at the moment of crisis, Congressman Laurens, who had called the congressional debate "silly,"[68] acknowledged the dangerous precedent this action represented. "You know Men have been Seized & confined because their going at large was judged by the Executive power to be dangerous to the State. A dangerous Rule I confess this would be in days of tranquility, but you well know it is absolutely necessary for the Safety of each State in our present Circumstances."[69]

Once the "present circumstances" had changed, concerns about the seizures prevailed, and by mid-April, the remaining Virginia exiles had begun the journey back to Philadelphia. On April 27, 1777, the Council (which had fled Philadelphia and was meeting in Lancaster) "discharged" them from captivity.[70]

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[67] *Id., in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 633. It is difficult to determine the number of congressmen on each side of the debate. Laurens wrote, for example, "You will be again surprized when I tell you that during the important debates on the Subjects of borrowing money & removing Enemies from our bosoms we have Seldom seen more than twenty members upon the floor, & more than once, business has been interrupted by want of members (9 States) to make a Congress." *Id., in* 7 Letters of Delegates to Congress, 1774-1789, *supra* note 25, at 634. Despite his apparent disgust at the time spent on the issue, in another letter even Laurens faulted Congress for acting "upon the spur of the occasion. All these & many better things ought to have been done if necessary, with more deliberation & consequently with more decency." *See* Letter from Henry Laurens to Lachlan McIntosh (Sept. 1, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 586 (referring, apparently, to seizure and exile of other political figures as well as seizure of Quakers and their papers).

[68] *See supra* note 65 and accompanying text.

[69] Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 613.

[70] *See* Pennsylvania Council, Minutes of the Supreme Executive Council of the

The events surrounding their release provided the captives with evidence of opposition from leaders outside Quaker circles. For example, on their journey from Virginia back to Philadelphia they met with General Gates, who reportedly told them "[i]f I had been in Philadelphia at the time of your being arrested and sent into exile, I would have prevented it."[71]

Perhaps the most direct evidence of worries about the precedent established by the seizures is expressed in a letter sent by the Council to Congress in March, more than a month before the captives' release. The Council requested that Congress authorize the prisoners' release because the crisis in Philadelphia had eased and because "the dangerous example which their longer continuance in banishment may afford on future occasions has already given uneasiness to some good friends to the independency of these States."[72]

This letter seems to capture the Founders' position on "profiling"—here based on religion—as a justification for searches and seizures in a time of crisis. Faced with a direct threat to the survival of the fledgling nation, national and state political leaders were willing to conduct searches and seizures in violation of common law precedents and written constitutional rules requiring adequate particularized suspicion, an oath or affirmation, and decision making by a neutral magistrate. They were willing to confine people for extended periods of time without a hearing, primarily because the captives were members of a particular religious minority believed to favor the enemy.

Yet all of this was not done easily or without debate. Even at the height of the crisis, members of Congress objected to

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Commonwealth of Pennsylvania (Apr. 27, 1778), *reprinted in* GILPIN, *supra* note 19, at 231.

[71] The Journal of the Friends in Exile in Virginia (Apr. 19, 1778), *reprinted in* GILPIN, *supra* note 19, at 227. One of the group's leaders, Israel Pemberton, asserted that, by the time of their release, "we have at length obtained from the Council a tacit acknowledgment of the injustice of our banishment . . . ." *Id.*, *reprinted in* GILPIN, *supra* note 19, at 199.

[72] Minutes of the Continental Congress (March 10, 1778), *reprinted in* GILPIN, *supra* note 19, app. at 277 (emphasis omitted) (quoting a letter from the Executive Council of Pennsylvania).

government conduct violating the Quakers' procedural and substantive legal rights. Once the crisis had eased—not ended, because the war dragged on for another half decade—national and state leaders hurried to end the worrisome precedent. As much as these events might suggest that the Founders were cavalier about rules against unwarranted searches and seizures, they also reveal a powerful commitment to rules protecting liberty from government overreaching.

These events support the conclusion that in times of profound crisis "profiling happens." But that is not the only lesson. Another is that advocacy on behalf of the captives' rights affected the course of events. Unlike the Japanese-American detainees who were held captive until the end of World War II, the Virginia exiles were not held in custody for the remaining years of the conflict, although the war was being waged on American soil, not thousands of miles away. The Quakers' relatively quick release is attributable, in part, to the relentless efforts by the captives and their supporters to persuade political leaders that the seizures violated fundamental rights: freedom of religious belief, the right to due process and the right to be free from arbitrary and unjustified seizures. The scope of the latter right was at the heart of the most savage "profiling" in the nation's history.

III. RUNAWAY SLAVES

If racial profiling "concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures,"[73] it is hard to imagine a cruder example than the one contained in this nineteenth century advertisement offering rewards for the capture of runaway slaves:

> $300 REWARD is offered for the apprehension of negro woman, REBECCA JONES and her three children, and man ISAIAH, belonging to W.W. Davidson, who have disappeared since the 20th inst. The above reward will be paid for the apprehension and delivery of the said Negroes to my Jail, by

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[73] Guidance, *supra* note 2.

> the attorney in fact of the owner, or the sum of $250 for the man alone, or $150 for the woman and three children alone.
> feb. 1 WM. W. HALL, for the Attorney[74]

This description of the fugitives literally describes every Negro man, woman and child. Consider just a few of the omitted details: age, height, weight, gender of the children and any other identifying physical characteristics. Race is the only essential criterion for becoming a suspect. All Negro men, women and children were potential suspects and potential victims of seizures by slave hunters.

The history of slavery in this country supplies numerous examples of advertisements for runaways.[75] Many, perhaps most, included more descriptive details than did the one offering a reward for Rebecca Jones.[76] But it is unnerving to read

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[74] Runaway Slave Advertisement (Feb. 1, 1856), *reprinted in* WILLIAM STILL, THE UNDERGROUND RAILROAD 337 (Johnson Publishing Co., Inc. 1970) (1871).

[75] *See* JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES app. 1, at 297-300, app. 7, at 328-32 (1999) (showing examples of runaway slave advertisements and a table depicting number of ads in selected newspapers in various states); 1 RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HISTORY FROM THE 1730S TO 1790 (Lathan A. Windley ed., 1983) (giving compilation of runaway slave advertisements from Virginia and North Carolina); STEALING A LITTLE FREEDOM: ADVERTISEMENTS FOR SLAVE RUNAWAYS IN NORTH CAROLINA, 1791-1840 (Freddie L. Parker ed., 1994); STILL, *supra* note 74; Runaway Slave Notice (1854), *reprinted in* WILLIAM H. WILLIAMS, SLAVERY AND FREEDOM IN DELAWARE, 1639-1865, at 164 (1996) (showing example of a runaway slave notice).

[76] *See* Runaway Slave Advertisement, N.C. MINERVA & RALEIGH ADVERTISER, Oct. 25, 1816, *reprinted in* FRANKLIN & SCHWENINGER, *supra* note 75, at 209 (advertising search for "a NEGRO MAN, named FRANK, pretty stout, one strait scar on his cheek passing from the under part of the ear towards the corner of the mouth, of a common dark color, something of a flat nose, a short, round chin, and a down look, about 26 or 27 years of age. Had on, brown yarn homespun Pantaloons, striped homespun waistcoat, and a white yarn round-about."); Runaway Slave Advertisement, THE STAR (Raleigh), Jan. 10, 1811, *reprinted in* STEALING A LITTLE FREEDOM: ADVERTISEMENTS FOR SLAVE RUNAWAYS IN NORTH CAROLINA, 1791-1840, *supra* note 75, at 398 (advertising search for a runaway named Jack, stating, "he is of a middle size, about five feet five or six inches high, and about 30 years of age; he has a down look, speaks slow when spoken to, and the whites of his eyes are inclined to be red, has a surley look and is considerably knock-kneed. His dress, when he went away, consisted of a pair of mixt pantaloons, a blue broad cloth waistcoat, and a short coat made of Negro cotton dyed brown, and a cotton shirt."); Runaway Slave Advertisement, VA. GAZETTE, Oct. 15-22, 1736, *reprinted in* 1 RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HIS-

advertisement after advertisement containing descriptions that would permit slave catchers extraordinary discretion in their seizures of alleged runaways. Even when advertisements included descriptions, the details often were too general to provide anything recognizable as "particularized suspicion." For example:

> $200 REWARD.—Ran away from the subscriber, living on the York Turnpike, eight miles from Baltimore city, on Sunday, April 11th, my negro man, JACOB, aged 20 years: 5 feet 10 inches high; chestnut color; spare made; good features. I will give $50 reward if taken in Baltimore city or county, and $200 if taken out of the State and secured in jail so that I get him again.
>
> WM. J.B. PARLETT[77]

> RAN AWAY—$500 REWARD.—Left the Tobacco Factory of the subscriber, on the 14th inst., on the pretence of being sick, a mulatto man, named ELIJAH, the property of Maj. Edward Johnson, of Chesterfield county. He is about 5 feet 8 or 10 inches high, spare made, bushy hair, and very genteel appearance; he is supposed to be making his way North. The above reward will be paid if delivered at my factory.
>
> RO. J. CHRISTIANS.[78]

TORY FROM THE 1730S TO 1790, *supra* note 75, at 1 (describing runaway Will as "a lusty well-set Fellow, with a yellow Complexion; one of his middle Fingers has been hurt, and so by that Means is larger than the other; he has a large Scar on the Top of one of his Feet. Had on, when he went away, an Oznabrig Shirt, a Pair of Crocus Breeches, a Manx-cloth Wastcoat, and a Worsted Cap"); Runaway Slave Advertisement (April 18, 1857), *reprinted in* STILL, *supra* note 74, at 115 (describing Richard, a runaway, as "thirty years old, but looks older; very short legs, dark, but rather bright color, broad cheek bones, a respectful and serious manner, generally looks away when spoken to, small moustache and beard (but he may have them off). He is a remarkably intelligent man, and can turn his hand to anything. He took with him a bag made of Brussels carpet, with my name written in large, rough letters on the bottom, and a good stock of coarse and fine clothes, among them a navy cap and a low-crowned hat."); Runaway Slave Advertisement (1854), *reprinted in* WILLIAMS, *supra* note 75, at 164 (describing runaway as having "rather trim buil[d] . . . thin lips, white teeth, rather flat nose, white eyes and rather blacker than ordinary" and wearing a "dark Cassimere dress frock coat").

[77] Runaway Slave Advertisement, BALTIMORE SUN, 1858, *reprinted in* STILL, *supra* note 74, at 476.

[78] Runaway Slave Advertisement, 1857, *reprinted in* STILL, *supra* note 74, at

> $300 REWARD.—Ran away from the subscriber, from the neighborhood of Town Point, on Saturday night, the 24th inst., my negro man, AARON CORNISH, about 35 years old. He is about five feet ten inches high, black, good-looking, rather pleasant countenance, and carries himself with a confident manner. He went off with his wife, DAFFNEY, a negro woman belonging to Reuben E. Phillips. I will give the above reward if taken out of the county, and $200 if taken in the county; in either case to be lodged in Cambridge Jail.
>
> October 25, 1857 LEVI D. TRAVERSE[79]

Although containing more details than the advertisement for Rebecca Jones, it is important to recognize how much latitude these descriptions provided to slave catchers. The most significant identifying characteristic in these advertisements is skin color: "chestnut color," "mulatto," "black." Although nuances of pigmentation were important in a world of race-based slavery,[80] each of these hues was exhibited by many people, and observers might disagree about which nuanced classification applied to a particular person. The age, height and build (spare made) estimates also described many people. The other

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157. One really must marvel at the slave owner's credulity. If the topic were not so awful, it would almost be quaint to read that Elijah escaped "on the pretence of being sick." One doubts the pretense and assumes that Elijah was sick of being a slave. Similarly, it took little insight to arrive at the unremarkable conclusion that the runaway is "supposed to be making his way North."

[79] Runaway Slave Advertisement, CAMBRIDGE DEMOCRAT, Nov. 4, 1857, *reprinted in* STILL, *supra* note 74, at 88.

[80] *See, e.g.,* FRANKLIN & SCHWENINGER, *supra* note 75, at 214.

> Although at times the precise color of the runaway was not stated and "negro wench" or "negro fellow" could describe a person of mixed origin, 70 percent of the runaways in the early period were either black or their skin was so dark that readers of runaway newspaper advertisements would assume they were.

Id.

> [I]f "negro" was used with no additional information on color, the runaway was considered black; if no color was indicated, the runaway was also cited as black. Since owners were quick to point out those of mixed racial origin even when they used the term "negro" (i.e., "negro mulatto"), this method, which gives a color designation to all slaves in the RSDB [the authors' "Runaway Slave Database"], is probably relatively accurate.

Id. at n.*.

qualities cited, "good features," "very genteel appearance" and "good-looking, rather pleasant countenance, . . . confident manner" are fundamentally subjective. Even in the nineteenth century, "good looking" was in the eye of the beholder.[81]

As unsettling as it is to read these advertisements offering rewards for the capture of runaway human property described primarily by their race, it is just as unnerving to recognize that slave catchers pursuing these runaways were justified not just by the laws of the slave states, but also by a statute passed by the Second Congress and by a specific constitutional provision crafted by the Framers. The Fugitive Slave Clause[82] contained in Article IV of the Constitution arose out of a crisis, but not a crisis of war or terrorism. It was the product of the crisis facing those trying to craft a new system of government in 1787 out of the political and economic failures of the Articles of Confederation. The kind of racial profiling embodied in the fugitive slave advertisements was authorized by political compromises reached at the Constitutional Convention.

Some elements of the Framers' political compromises concerning slaves and slavery are well-known.[83] Slaves, referred to as "other persons," were counted as three-fifths of a person

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[81] As noted above, many advertisements provided more details, like scars and other injuries, or even details about the escapees' clothing. *See, e.g.,* advertisements discussed *supra* note 76.

[82] U.S. CONST. art. IV, § 2, cl. 3. Because of the Framers' euphemistic references to slavery in the Constitution, the text refers to those "escaping from labour," and not fugitives from slavery. Nonetheless, the provision is commonly referred to as the Fugitive Slave Clause. *Id.*

[83] This became a key argument during the debate over the proposed Fugitive Slave Act of 1850. Responding to Senator Dayton of New Jersey, Senator Pratt of Maryland argued:

> [W]hat was [sic] the relative positions of the slave States and the Federal Government at the time of the formation of this Constitution? Why, sir, Maryland was a soverign [sic] State then . . . . So were all these States. Well, the Constitution is a simple treaty, or agreement on the part of those States to give up a part of their respective sovereign rights for the purpose of forming a General Government. . . . Maryland was then as sovereign as Mexico is now. She would not have entered into this treaty with the General Government, it is possible, but for this obligation [enforcing property rights of slave owners] assumed by the Government.

CONG. GLOBE, 31st Cong., 1st Sess. app. at 1240 (1850) (remarks of Sen. Pratt of Maryland on August 21, 1850).

for purposes of apportioning direct taxes and representation in the House of Representatives.[84] Congress was prohibited from ending the slave trade—"[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit"—before 1808.[85]

But these were not the only concessions designed to induce the slave states to cede part of their sovereignty to the new national government.[86] The Constitution's Fugitive Slave Clause was adopted to protect slave owners from the economic losses they experienced when slaves escaped to northern states, where both the residents and state laws might impede the owners' efforts to reclaim the runaways.[87] The Constitution declared:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of

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[84] U.S. CONST. art. I, § 2, cl. 3. For the background of the compromises about the three-fifths apportionment and the 1808 limit on ending the slave trade, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 20-24 (1978).

[85] U.S. CONST. art. I, § 9, cl. 1. Apparently the slave states did not trust this constitutional prohibition to protect the slave trade. Article V establishes the procedures for amending the Constitution, but expressly commands that, before 1808, "no Amendment . . . shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article." *Id.* art. V.

[86] "[W]ithout the adoption of [the Fugitive Slave Clause] the Union could not have been formed." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842) (Story, J.). Seven justices published opinions in *Prigg*. Five of them, including Justice Story, recognized the importance of this element of the compromises that preserved slavery in the new democracy. See FEHRENBACHER, *supra* note 84, at 42; *see also* CONG. GLOBE, *supra* note 83, app. at 1240 (remarks of Sen. Pratt of Maryland on August 21, 1850).

[87] This was the accepted view of the importance of the Fugitive Slave Clause in the nineteenth century legal and political debates, even in northern states with personal liberty laws adopted to limit the activities of slave catchers. *See, e.g.*, Johnson v. Tompkins, 13 Fed. Cas. 840, 852 (E.D. Pa. 1833) ("[The] foundations of the government . . . rest on the rights of property in slaves."); Wright v. Deacon, 5 Serg. & Rawle 62, 63 (Pa. 1819) ("[I]t is well known that our southern brethren would not have consented to become parties to a constitution . . . unless their property in slaves had been secured."). *But see* FEHRENBACHER, *supra* note 84, at 25 (disputing commonly asserted position "that without the clause the Constitution would have failed").

> the Party to whom such Service or Labour may be due.[88]

How the Clause was to be enforced was unclear. Slaves fled from bondage before 1787, and they continued to escape after the Constitution was ratified. Opponents of slavery in the northern states were unlikely to "deliver up" runaway slaves or free blacks to slave hunters making a claim that "Service or Labour" was "due." Yet the Fugitive Slave Clause provided no guidance about how it was to be enforced. Five years after ratification, the Second Congress passed legislation intended to implement the Fugitive Slave Clause.[89] Passage of the 1793 Fugitive Slave Act[90] (1793 Act) apparently was triggered by a notorious incident that occurred around the time of ratification. During the critical legislative debates over the 1850 Fugitive Slave Act, Senator Winthrop narrated one version of those events:

> In the year 1788 or 1789 a free negro, residing in the State of Pennsylvania, named John, was kidnapped by three white men from the State of Virginia. These three white men were indicted for the crime; and as they had fled to the State of Virginia, they were demanded by Governor Mifflin, of Pennsylvania, under the instigation of the abolition society of that State, over which, if I mistake not, Benjamin Franklin about that time presided. The Governor of Virginia . . . decided that there was no law for carrying into effect that clause of the Federal Constitution just then going into operation, under which fugitives from justice were to be surrendered. He therefore refused to deliver up the three white men indicted as having kidnapped a free negro. Governor Mifflin, soon after, communicated these facts to General Washington, then President of the United States, who communicated them to Congress, and upon this communication the law of 1793 was based.[91]

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[88] U.S. CONST. art. IV, § 2, cl. 3. This clause was nullified by the Thirteenth Amendment.

[89] A Committee of the House of Representatives produced a fugitive slave bill as early as November 1791. THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 19 n.74 (1974).

[90] Act of Feb. 12, 1793, ch. 7, §§ 3, 4, 1 Stat. 302.

[91] CONG. GLOBE, *supra* note 83, app. at 1585 (remarks of Sen. Badger of

Senator Winthrop's tale embodies a number of elements common to the conflicts over the capture of runaway slaves that persisted from ratification of the Constitution until the Civil War. First, opponents of slavery claimed that a free man had been illegally kidnapped and enslaved. One of the recurring complaints leveled by anti-slavery activists was that enforcement of the fugitive slave laws frequently led to the greatest injustice; free men, women and children were captured illegally, then sold into bondage.[92] To label this profiling—people impressed into slavery because of their race—is accurate, although the crime is far more horrific than the twentieth century label suggests.

Second, the dispute was between Pennsylvania and Virginia, two of the states on the borders of free and slave territory. Although acts of civil and uncivil disobedience impeding the recovery of runaway slaves occurred in northern states as far flung as Massachusetts and Iowa,[93] disputes commonly arose among the border states.[94] Opposition in Pennsylvania to the

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North Carolina on August 19, 1850); *see also* FEHRENBACHER, *supra* note 84, at 40 ("The act of 1793 resulted instead from a quarrel between Pennsylvania and Virginia over criminal extradition."); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397 (1990). *But see* MORRIS, *supra* note 89, at 19 (asserting the dispute arose out of Virginia's refusal to extradite to Pennsylvania three men accused of murdering four Delaware Indians).

[92] *See* MORRIS, *supra* note 89, at 33-34, 53-58.

[93] *See, e.g.,* Daggs v. Frazer, 6 F. Cas. 1112 (D. Iowa 1849) (No. 3583); Kauffman v. Oliver, 10 Pa. 514 (1849); *see also* FEHRENBACHER, *supra* note 84, at 57 (discussing court decisions in various northern states, including Massachusetts, Connecticut, New York and Pennsylvania).

In the Senate debate over the Fugitive Slave Law of 1850 on August 19, 1850, Senator Winthrop of Massachusetts referred to a publication that described the outcome of *Daggs v. Frazer*:

> In an action brought in the United States district court of the southern district of Iowa, by Ruell Daggs, of Clark county, Missouri, plaintiff, against Elihu Frazier and four other defendants, for harboring, concealing, and preventing the arrest of plaintiff's slaves, who had absconded into Iowa, the jury found a verdict for the plaintiff of $2,900.

CONG. GLOBE, *supra* note 83, app. at 1585.

[94] *See, e.g.*, CONG. GLOBE, *supra* note 83, app. at 1240 (remarks of Sen. Pratt of Maryland on August 21, 1850) (explaining how Kentucky, Maryland and Virginia had a direct interest in the debate over the proposed Fugitive Slave Act,

activities of slave catchers from Virginia (or Maryland) was a continuing source of conflicts.[95] Later, disputes often arose involving attempts to seize slaves from Kentucky who had fled to Ohio.[96]

Third, these disputes involved public and private actors. Both the Fugitive Slave Clause and the 1793 Act empowered slave owners, bounty hunters and other private actors to seize people alleged to be runaway slaves. Yet the most important events in the history of disputes concerning runaway slaves frequently involved efforts by advocates on both sides of the issue to enlist the support of their state governments.[97] Frequently, antislavery activists in Pennsylvania and other northern states would utilize state laws and enlist the aid of politicians, law enforcers and courts in their efforts to obstruct slave catchers.[98] Similarly, government actors in Virginia and other

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while slave owners from "South Carolina, Mississippi, and Georgia can seldom lose their servants, and are not consequently interested in the amendment").

[95] For example, the Supreme Court's important decision interpreting the 1793 Act and the Fugitive Slave Clause, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), invalidated Pennsylvania's 1826 Personal Liberty Law, which had been used to convict Prigg, a slave catcher, of kidnapping. *See* MORRIS, *supra* note 89, at 42-53.

[96] *See, e.g.*, Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Strader v. Graham, 51 U.S. (10 How.) 82 (1850).

[97] *See, e.g.*, FEHRENBACHER, *supra* note 84, at 18.

> In the circumstances, then, the antislavery tendencies of the Revolutionary decades were not inconsiderable and amounted to a new departure. State after state took steps to end the African slave trade, though effective enforcement proved to be another matter. Abolition of slavery itself was achieved in New England and Pennsylvania, and it seemed only a matter of time in New York and New Jersey. Further south, the revulsion against slavery was in large measure confined to expressions of hope for eventual abolition. But Virginia in 1782 gave strong encouragement to private manumissions by removing earlier restrictions upon them, and both Maryland and Delaware subsequently followed her example. . . . By the 1790s, abolition societies had appeared in every state from Virginia northward, with prominent men like Benjamin Franklin, John Jay, and Alexander Hamilton in leading roles. And the climax came in 1787 when slavery was prohibited in the Northwest Territory with scarcely a dissenting vote.

Id.

[98] *See* MORRIS, *supra* note 89, at 8-12 (discussing both reliance on common writs and analogous legislation in efforts to free alleged slaves in northern states).

southern states would protect residents accused of violating the personal liberty laws of a northern state.[99]

Fourth, partisans on both sides of the issue argued about whether authority to enforce the Fugitive Slave Clause of the national Constitution was vested in the states, the national government or both. The Supreme Court decided this issue almost twenty years before the Civil War. In the famous case, *Prigg v. Pennsylvania*,[100] it determined that enforcement authority was vested in the federal government, but like many of the Court's controversial decisions, it failed to produce a consensus. Years later, slavery's opponents still argued that the high court had simply been wrong.[101]

Finally, both sides could find support from among the Founders. Senator Winthrop invoked two of the most important Founders, Franklin and Washington, and pointedly placed Franklin in the abolitionist camp. Senators supporting passage of a stronger Fugitive Slave Act in 1850—a law crafted to eliminate a variety of impediments raised against slave catchers in northern states—also could rely on individual Founders. Senator Badger's description of the Framers' relationship to the 1793 Fugitive Slave Act is instructive:

> [T]his act was passed by the contemporaries of the framers of the Constitution, by men familiar with all the discussions which preceded its adoption, and that among them were many members of that Convention which framed the Consti-

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[99] *See, e.g.*, Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 618-20 (1993).

[100] 41 U.S. (16 Pet.) 539 (1842).

[101] *See* CONG. GLOBE, *supra* note 83, at 481 (remarks of Daniel Webster of Massachusetts) ("I have always been of the opinion, that it was an injunction upon the States themselves."); *see also* FEHRENBACHER, *supra* note 84, at 25. Fehrenbacher concluded that:

> Placement of the fugitive-slave clause in Article Four, rather than in Article One, suggests that it was designed as a limitation on state authority and not as an extension of federal power and responsibility. That is, the purpose was to guard against personal-liberty laws [enacted by the States], rather than to provide for a national fugitive-slave law. The very language of the clause seems plainly directed at the states, not at Congress.

Id.; *see also infra* notes 111, 124-25 and accompanying text.

> tution; among them were many eminent members of that body. To name no other, Mr. Madison was one. These men, in passing the act of 1793, recognized in the provision of that clause of the Constitution this duty as imposed upon the Government of the United States; and they passed an act founded upon that supposition, and defensible upon no other.[102]

The statute had received overwhelming votes of support in both houses of Congress,[103] which included Madison[104] and other members of the founding generation.[105] In practice, the 1793 Act encouraged slave catchers to seize people based solely on their race.

A. The Fugitive Slave Act of 1793

Reading the text of the statute removes any doubts about its purpose, or the power it ceded to slave owners and their agents to exercise an expansive version of the common law power of an owner to recover private property.[106] The statute's central provisions are so antithetical to contemporary conceptions of legal equality that they warrant quotation. Section 3 of the Act empowered slave catchers to seize people in the free states and carry them into slavery:

> SEC. 3. And be it also enacted, That *when a person held to labour* in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the

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[102] CONG. GLOBE, *supra* note 83, app. at 1594-95 (remarks of Sen. Badger of North Carolina on August 19, 1850). The Senator's specific claim was that the Supreme Court's holding in *Prigg* (that the Fugitive Slave Clause vested exclusive authority in the federal government to enforce slave owners' property rights) was correct.

[103] *See* 2 ANNALS OF CONG. 630, 640, 860-61 (1789).

[104] As a slave owner, politician and advocate of republican theories, Madison was forced into contradictory positions. *See, e.g.*, THE FEDERALIST No. 54 (James Madison); *see also* DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON & THE REPUBLICAN LEGACY 22-23, 109-110, 230-34, 244-46, 260-63 (1989).

[105] The Ordinance of 1787 had prohibited slavery in the territories, but assured the right of slave owners to pursue and capture runaway slaves. This compromise apparently was based upon work by a committee in the Congress as early as 1785. *See* MORRIS, *supra* note 89, at 16 & nn.65-66.

[106] *See* MORRIS, *supra* note 89, at 3-4.

> laws thereof, *shall escape into any other of the said states or territory, the person to whom such labour or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labour*, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour to the state or territory from which he or she fled.[107]

The statute authorized private slave catchers to cross state boundaries to enforce a slave owner's alleged property rights in one state by seizing a person residing in another. Slave catchers could seize any person. The statute allowed the captor to obtain a certificate from a judicial officer authorizing him to take the alleged slave across state lines. If the slave catcher bothered with this procedure, the Act abandoned common procedural protections for the rights of those captured as criminals.[108] The seized person was not entitled to trial by jury, was not guaranteed the right to testify[109] and oral testimony was permitted to prove the claim of ownership.[110] As a result, if a hearing was held the case might be decided on ex parte proof from the captor. The law imposed no statute of limita-

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[107] Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05 (second and third emphasis added). Like Article IV of the Constitution, the 1793 Act also enacted provisions concerning fugitives from more traditional criminal justice.

[108] Escaping from slavery was in itself a criminal act under the laws of the slave states. *See infra* notes 112-13 and accompanying text.

[109] *See, e.g.,* FEHRENBACHER, *supra* note 84, at 35 ("[N]o southern state permitted a slave to testify against a white person.").

[110] The loose, "ex parte" evidentiary provisions of the Act were a recurring target of antislavery activity in the nineteenth century. *See, e.g.,* MORRIS, *supra* note 89, at 34, 44.

tions, so the capture could occur years or even decades after the person allegedly had escaped.[111] Finally, although legal process was permitted, the law did not explicitly require the bounty hunter to take the captive before a judge or magistrate to secure a certificate.[112]

"The act was in fact an invitation to kidnapping, whether as a result of honest error or easily contrived fraud."[113] As a practical matter, the statutory authority to seize people suspected of being slaves condoned racial profiling because in the eighteenth and nineteenth centuries the presumption in the slave states was that a person's status as slave or free was linked to race. An opinion by a justice of the Virginia Supreme Court declared, for example:

> In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew [sic] that he is a slave.[114]

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[111] The facts of *Prigg v. Pennsylvania* provide a poignant example. The alleged fugitive slaves had lived as free people for several years in Pennsylvania before the heir of the former owner sent slave catchers to capture her "inherited property." Finkelman, *supra* note 99, at 610-11. For a description of the people involved, see *id.* at 605, 609-11.

[112] *See, e.g.*, CONG. GLOBE, *supra* note 83, app. at 1587 (remarks of Sen. Chase of Ohio on August 19, 1850) (disputing assertion by southern Senators that federal law permitted private seizures without resort to legal proceedings, but asserting that this often happened in border states like Ohio).

[113] FEHRENBACHER, *supra* note 84, at 41.

[114] Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 141 (1806) (Roane, J.). Two opinions were issued in the case. Both judges accepted the existence of a rebuttable legal presumption that a person's status as free or slave was determined by race. *See Hudgins*, 11 Va. (1 Hen. & M) at 137, 139 (Tucker, J.).

> From the first settlement of the colony of Virginia to the year 1778 . . . all negroes, Moors, and mulattoes . . . brought into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the females remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.
>
> . . .
>
> All white persons are and ever have been FREE in this country. If one evidently white, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

In the South, blacks were presumed to be slaves[115] unless they could prove otherwise.[116] Enforcement of fugitive slave laws had the practical effect of applying this presumption in other states, as well as assisting in the enforcement of state laws making it a crime to leave the owner's custody.[117] Thousands of slaves committed that crime.[118] Slave owners and their agents relied upon not only the laws of the slave states but also upon the 1793 Act and the Fugitive Slave Clause to justify seizures of black men, women and children.[119]

Id. (emphasis omitted).

[115] Eventually, southern states began to impose the same legal infirmities on free blacks as slaves. "[T]his meant that free Negroes were subject to search without warrant . . . ." FEHRENBACHER, *supra* note 84, at 62.

[116] *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 669 (1842) (McLean, J., dissenting) (asserting that, in the states "where slavery is allowed, every coloured person is presumed to be a slave; and on the same principle, in a non-slave holding state, every person is presumed to be free without regard to colour").

[117] *See* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2068-69 (1993); *see also* CONG. GLOBE, *supra* note 83, app. at 1238 (remarks by Sen. Pratt of Maryland on August 20, 1850) ("The Legislature of Maryland had passed a law making it a felony for a slave to escape from his master.").

[118] *See, e.g.*, *supra* note 75 (listing examples of works depicting the experiences of runaway slaves).

[119] In the years following the enactment of the 1793 Act, at least two states, South Carolina and Louisiana, enacted laws permitting the capture of free blacks who arrived in their ports on boats (typically as crew members). Their only "crime" was arriving in the state as a free black. The captive would not be released from custody until the vessel sailed from the port, and only if the master of the vessel paid a charge imposed for the cost of the imprisonment. If the fee was not paid, the free black crew member could be sold into slavery. *See* CONG. GLOBE, *supra* note 83, app. at 1586 (remarks of Sen. Winthrop of Massachusetts on August 19, 1850) (referring to these laws as permitting seizure "without any charge of crime, and without any examination except to ascertain the color of their skin"); *id.* app. at 1587 (remarks of Sen. Butler of South Carolina on August 19, 1850) (asserting that South Carolina's law "is rarely put into operation; and yet it may be a salutary law to be held *in terrorem* over this class of persons"); *id.* app. at 1674-77 (explanation by Sen. Winthrop on September 28, 1850) (appending to the records statutes, affidavits and other records documenting the seizure of free black crew members under these state laws).

The southern mistreatment of free blacks took other forms. *See, e.g.*, FEHRENBACHER, *supra* note 84, at 35-36.

> The fear of insurrection was also reflected in southern hostility to free Negroes, who were widely regarded as a subversive influence on slaves, by their example if not by any actual intent. With increasing severity,

Opposition in the North to the capture of slaves sometimes took the form of civil disobedience, including mob violence to rescue the captives.[120] The 1793 Act included a separate section that prohibited interference with slave catchers, and not only permitted the slave owner to sue for damages, but also for a significant statutory penalty to be collected from those who had rescued or concealed the alleged slaves "for the benefit of such claimant."[121]

The 1793 Act's procedural and evidentiary requirements were so loose that they "gave rise to the kidnapping of free blacks."[122] The threat of these kidnappings prompted many northern states, most notably Pennsylvania, to enact "personal liberty laws" to protect free blacks,[123] which were enforced in state courts, before and after the Supreme Court's decision in *Prigg v. Pennsylvania* held that the states could not enact laws designed to obstruct the recovery of runaway slaves.[124]

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most of the slaveholding states endeavored to eliminate this dangerous social element by forbidding or discouraging manumission; by compelling manumitted slaves to leave the state; by prohibiting the immigration of free blacks from other states; and by subjecting the resident free black population to additional restraints and disabilities amounting virtually to persecution.

Id.

[120] *See, e.g.,* MORRIS, *supra* note 89, at 156-57.

[121] The 1793 Act specifically provided:

> That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared or shall harbor or conceal such person after notice that he or she was a fugitive from labour as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labour or service, his right of action for or on account of the said injuries or either of them.

Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. 302, 305.

[122] Finkelman, *supra* note 99, at 622-23.

[123] *Id.* at 623-24.

[124] Among the ways that the 1826 Pennsylvania Personal Liberty Law "obstructed" the rights of slaveholders and slave catchers were: (1) It restricted private self-help by authorizing issuance of a warrant for the seizure of the alleged fugitive slave that could only be executed by the appropriate sheriff or constable.

In *Prigg*, a majority of the Justices agreed that "Congress had exclusive power to regulate the rendition of fugitive slaves."[125] Justice Story's majority opinion confirmed that the Fugitive Slave Clause "manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain."[126] Story's opinion later concluded that "the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence."[127] The Fugitive Slave Clause guaranteed slave owners' property rights "to the same extent" in every state,[128] and therefore a slave owner must "have the right to

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(2) The warrant could only be issued if the person seeking it produced both his own oath or affirmation and the affidavit, certified under oath, of the alleged owner. The affidavit had to include details supporting the claim that the seized person was a slave owned by the claimant. (3) It repealed the right of private "reception" permitted under a 1780 state law. (4) The certificate permitting removal of the seized person into slavery could only be issued by a judicial officer, and the evidentiary requirements for adequate proof were not as loose as those enacted by Congress in the 1793 Act. For example, the Pennsylvania statute established a period of time for the alleged fugitive to gather evidence in opposition to the claim against him. MORRIS, *supra* note 89, at 51-52 (citing 1826 Pa. Laws 150-55). Each of these requirements simply imposed some elements of due process to an inherently inequitable process.

[125] Finkelman, *supra* note 99, at 630.

[126] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

[127] *Prigg*, 41 U.S. (16 Pet.) at 613.

[128] The Supreme Court's decision in *Prigg* confirmed "the involvement of the federal government in the protection of slavery." FEHRENBACHER, *supra* note 84, at 43. As a result, the decision attempted to impose the most noxious form of race-based "profiling" in the free states. The Court concluded that the Fugitive Slave Clause

> gave every slaveholder the "positive, unqualified right" to recapture a slave by private effort anywhere in the Union, and to do so without interference from any quarter, provided that no breach of the peace were committed. This right of self-help, said Story, was universal in the slaveholding states, and the fugitive-slave clause made if equally effective in all the free states. The slaveholder, in short, carried the law of his own state with him when he pursued a fugitive into a free state. The implications of such extraterritoriality were startling . . . . [The] ruling had the effect, for instance, of compelling free states to accept the slave-state principle that a Negro or mulatto was a slave unless he could prove otherwise.

seize and repossess the slave, which the local laws of his own state confer upon him as property . . . ."[129]

When the Justices decided *Prigg* in 1842, if they expected—or even hoped—that the decision would help ameliorate the festering sectional disputes about the capture of fugitive slaves, they were wrong. Courts, legislatures and citizens in the north continued to obstruct enforcement of the 1793 Act.[130] The decision in *Prigg* did not end, and perhaps encouraged, private individuals and groups to resist seizures of blacks by slave catchers.[131] By 1850, enforcement of the 1793 Act had become so difficult that southern politicians demanded a stronger fugitive slave law as an essential ingredient of any solution of the political conflicts that were ripping the nation apart.

B. The Fugitive Slave Act of 1850

The Fugitive Slave Clause in the Constitution and the 1793 Act were products of a crisis of creation. The Fugitive Slave Act of 1850 (the 1850 Act) was the product of a crisis of disintegration. By the end of the 1840s, sectional conflict over slavery encompassed a range of issues, and none was more volatile than conflict over the recapture of fugitive slaves.[132]

Id. at 44.

[129] *Prigg*, 41 U.S. (16 Pet.) at 613.

[130] *See, e.g.*, Finkelman, *supra* note 99, at 664 ("State judges refused to hear cases under the law, state legislatures barred enforcement of the law, and few fugitives were returned after *Prigg*.").

[131] *See, e.g.*, CONG. GLOBE, *supra* note 83, app. at 1588 (remarks of Sen. Butler of South Carolina on August 19, 1850) ("I concur with the Senator from Ohio [probably Chase] in this: That since the decision in the case of . . . Pennsylvania *vs.* Prigg, there has been less security for slave property escaping into free States, than there was before . . . ."); *id.* app. at 1238 (remarks of Sen. Pratt of Maryland on August 20, 1850).

[132] A convention held at Milledgeville, Georgia to consider the Compromise of 1850 produced a series of resolutions intended to present the views of pro-Union Georgians. The threat that the dispute over fugitive slaves posed to the survival of the Union is captured in the fifth resolve. "That it is the deliberate opinion of this Convention, that upon the faithful execution of the Fugitive Slave Bill by the proper authorities, depends the preservation of our much loved Union." The Georgia Platform, quoted in DOCUMENTS OF AMERICAN HISTORY 323 (Henry Steele Commager ed., 7th ed. 1963)

Secession by the slave states was an open threat, one raised frequently in the congressional debates that produced the 1850 Act and other elements of the Compromise of 1850.[133] For example, referring specifically to sectional conflict over enforcement of the 1793 Act, Senator Pratt of Maryland warned that "[w]hen that day shall arrive, and it seems to be fast approaching, then all our efforts here or elsewhere will not prevent a dissolution of the union . . . ."[134]

The Compromise of 1850 embodied Congress's attempt to prevent that dissolution by resolving a cluster of questions linked largely by the issue of the future status of slavery as a protected form of property ownership. Would California, with its anti-slavery constitution, be admitted as a state? Would the slave trade, and even slavery itself, be abolished in the District of Columbia? Where would the borders of Texas be set, and would Texas be compensated for lost territory? How would slavery be handled—permitted, prohibited or left to the future decision by the residents—in the Utah and New Mexico territories? Slavery's advocates and opponents feared that resolution

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[133] *See, e.g.,* MORRIS, *supra* note 89, at 130 ("The . . . fear of an impending disruption of the Union by the secession of the slave states was to hang very heavily over the early deliberations of the Thirty-first Congress, which had to deal with the sectional crisis.").

[134] Both abolitionists and slave owners called for dissolution of the Union. *See, e.g.,* CONG. GLOBE, *supra* note 83, app. at 1591. Replying to earlier statements by Sen. Winthrop of Massachusetts, Sen. Pratt of Maryland agreed that:

> there are people, both North and South, who desire the separation of this Union, and the destruction of the Federal Government. Those at the North have been actuated by a wish to abolish slavery, and their desire to destroy the Government proceeds from the proclaimed fact, on their part, that the Constitution of the United States protects the master in his right to his slave as property, and the consequent inability, on their part, to abolish slavery. This, then, is the fanatic notion of those persons at the North, who desire to destroy the Government of the country. Now, there is a class of persons at the South, who, for reasons the exact opposite of those which have induced northern men to entertain these opinions, look to the Government of the country with like aversion, and think that a dissolution of this Union would be of advantage to the South, because this description of property would be better protected under a separate southern government . . . .

Id.; *see also id.* app. at 1240-41 (remarks of Sen. Pratt of Maryland on August 20, 1850); *id.* app. at 1019 (remarks of Sen. Upham of Vermont on July 2, 1850).

of these questions would provide the other side with insurmountable political and economic advantages. No question was more portentous than the southern demand for a new fugitive slave law.[135]

The Senate debate is justifiably the focus of historical inquiry into the 1850 Act, not merely because of the momentous subject matter, but also because of the eminence of the participants. In a Senate replete with famous figures,[136] the proceedings are renowned as the last great debate in which the trio of Clay, Calhoun and Webster all participated. Clay introduced the proposal that formed the basis for the eventual compromise;[137] Webster delivered his last important speech as a senator, pleading for survival of the Union; Calhoun died within four weeks of making his last speech in the debate. The results of the Senate debate were a set of compromises that served as a penultimate legislative attempt to preserve the Union from collapse and perhaps civil war.

In the months of debate, which began in January 1850, and continued for most of the year,[138] no issue generated more heat than did the problem of fugitive slaves.[139] Final Senate debate over the proposed Fugitive Slave Act of 1850 began in mid-August.[140] Mason of Virginia led the debate for

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[135] *See, e.g.,* FEHRENBACHER, *supra* note 84, at 160; SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 571-73 (1965).

[136] Including William Seward, Stephen Douglas, Jefferson Davis, Sam Houston and Salmon Chase. Morrison, *supra* note 135, at 571.

[137] In his historic January speech, Clay proposed that California's admission as a free state could be offset by creation of the New Mexico and Utah territories without antislavery restrictions; Texas would be reduced in size, but would be compensated for its lost territory; the slave trade would be ended in the District of Columbia, but slave owners would receive the assistance of a tougher federal fugitive slave law. *See id.* at 571-72.

[138] *See, e.g.,* FEHRENBACHER, *supra* note 84, at 161. ("Between July 31 and September 16, the Senate passed the compromise in six separate measures embodying the principal features of the original Clay resolutions. In no instance was the voting really close. The overall total of *yeas* was nearly double that of *nays*, with excessive abstentions on the New Mexico and fugitive-slave bills.").

[139] The various issues were referred to a committee, which proposed that most of the issues be lumped together into an omnibus bill—except the issues of fugitive slave legislation and the slave trade, which were to be debated and resolved separately. *See, e.g., id.* at 160.

[140] Debate over the issue of fugitive slaves was tabled during the spring, as

the South. His rhetoric was emotional, his arguments were inflexible.[141] On the first day of the final debates, Mason rejected any compromise on the South's primary demands on this issue. Mason laid the blame for the crisis squarely in the North. Nearly a decade after the Supreme Court had sought to impose legal order in its *Prigg* decision, Mason complained of continuing civil disobedience designed to thwart the recovery of runaway slaves. Slave owners and the southern states had been victims of northern malfeasance.

> Sir, it has become a part of the history of the country, that, when a slave once escapes and gets within the limits of the free States, . . . you may as well go down into the sea, and endeavor to recover from his native element a fish which had escaped from you, as expect to recover such fugitive—I mean under existing laws. Every difficulty is thrown in the way by the population to avoid discovery of where he is, and after this discovery is made, every difficulty is thrown in the way of executing process upon him. And if you should succeed so far as to execute the process, then every difficulty is thrown in the way by armed mobs to prevent the fugitive being carried before the proper officer to take cognizance of the case. And, if you should perchance succeed in doing this, and an adjudication should be made, *I do not know of an instance, within recent years, where the fugitive was not rescued by violence from the hands of the officer by an armed mob, and the parties claiming him put in peril of their lives.*[142]

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the Senate grappled with the other issues involved in the Compromise of 1850, which were initially considered as part of an omnibus bill, which in turn was eventually cleaved into separate bills. Debate over the separate fugitive slave bill was renewed on Monday, August 19, 1850. *See* MORRIS, *supra* note 89, at 141-47 (discussing the Senate debate over the fugitive slave bill).

[141] During the early parts of the debate, Mason argued for an unlimited right of recapture by slave owners, claiming that no one else possessed the "right to interpose between the claimant and the fugitive, or to inquire whether the slave be his, or whether he is a slave at all, far less to molest or hinder him in the capture." *See* CONG. GLOBE, *supra* note 83, at 233-35. On the issue of fugitive slaves, even Clay appeared to be inflexible. For example, he called on the legislature "to make penal laws, to impose the heaviest sanctions upon the recovery of fugitive slaves, and the restoration of them to their owners." *Id.* app. at 123 (remarks of Sen. Clayton of Delaware on February 6, 1850).

[142] *Id.* app. at 1583 (remarks of Sen. Mason of Virginia on August 19, 1850) (emphasis added).; *see also id.* app. at 1241 (remarks of Sen. Pratt of Maryland

Some northern senators were equally vehement in their sectional loyalty. When pressed by Senator Dayton of New Jersey, Mason clarified that his assertion that slave hunters had been thwarted in every "instance within recent years" encompassed a period of six to eight years—in effect, the period after *Prigg* had held that the national government, and not the states, had authority to enforce the Constitutional Clause and the 1793 Act. Dayton responded with an equal measure of sectional self-righteousness. Slave owners pursuing runaway slaves not only could obtain, but already had received, justice in northern courts. Mason's charges accusing people in the northern states of impeding enforcement of the 1793 Act were unjustified insults to a law-aiding people.

> Not within the last six or eight years, the Senator says. Well, I have on a previous occasion given to the Senate three instances in my own State, and occurring within that number of years. We are a border State, and we are one of those unfortunate States which, in reference to this matter of fugitive slaves, are perhaps more troubled than any other; and I wish, so far as I am individually concerned, that the slave States had each and every one of them back again. They are a pest and an annoyance to us. Our people are everywhere disposed to give them up according to law, but according to law only. There have been three cases in New Jersey within the last six or seven years, and I think two of them within the last four or five years, in which slaves were given up under the finding of juries, and two of them under the finding of juries made up almost exclusively of Quakers. *Sir, there is no tribunal upon which you can rest your rights more safely than you can upon twelve citizens, sworn then and there at the time and in the place to render a verdict according to the law and evidence.* . . . Within the time suggested such verdicts have been rendered in the State of Michigan. There have been two such cases in Pennsylvania within the last two years; there have been similar cases in Indiana and Illinois. There have also

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on August 21, 1850) (asserting that "since abolition has become an active element in the political contests of the day, I do not know a single case in which the fugitive has been surrendered to his master").

> been some two or three cases of the kind in Ohio, and I must think the instance referred to of the rescue by the mob is the exception, and that it is not the rule. Wherever a rescue has been made, and an action has been commenced, so far as I know, ample damages have been awarded and the amount paid.[143]

Dayton's comments illuminate the complexity of the dispute. Mason had attributed all blame for the conflicts over fugitive slaves to antislavery activists in the North; Dayton claimed the North was blameless. Yet he also acknowledged that eight years after *Prigg* northern states still were imposing procedural requirements, like trial by jury, that Southerners complained were used to impede the efficient completion of the private seizures authorized by law. By asserting that ample damages were paid when slave owners sued those who interfered with the recapture of runaways, Dayton acknowledged as well that northern activists continued to resist the capture of runaways. And in a comment with ironic implications for this paper, he implicitly characterized Quakers as people particularly opposed to slavery and the recapture of runaway slaves, yet still willing to decide cases in favor of the slave owner.

Finally, Dayton expressed a personal hostility to fugitive slaves that serves as a reminder of the ingrained prejudice exhibited by many in the North who opposed slavery. Unlike the Quakers seized during the Revolution, black slaves enjoyed no social status, no wealth, no political influence in the North. This was as weak and disadvantaged a minority as has ever lived in the nation. Whether free or slave, in the decades preceding the Civil War blacks were a group particularly vulnerable to profile-based seizures.

Yet southern senators dogmatically argued that free blacks never were kidnapped, only runaway slaves were ever seized, and seizures were always proper. Butler of South Carolina asserted, for example, that, although the lawful claims of slave owners in pursuit of fugitives had frequently been denied,

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[143] *Id.* app. at 1584 (remarks of Sen. Dayton of New Jersey on August 19, 1850) (emphasis added).

> I venture to say that since the law of 1791, I may safely make the broad assertion that *not a single case has occurred* where a person has pursued and taken a fugitive, or a person as a fugitive, who was not his property, or the property of one for whom he was acting as an agent.[144]

This assertion prompted a vigorous debate that exposed the fundamental southern presumption in the debate about seizures of fugitive slaves—blacks were slaves and whites were free. Walker of Wisconsin reported an incident where the daughter of Irish parents was seized in Pennsylvania and held as a slave in Maryland, and Butler responded by asking "Was she white?"[145] Walker of Wisconsin immediately complained that the assertion that a white girl could be seized as a runaway slave was an idea that "seemed to excite his mirth."[146] The idea that a slave could be white evidently was laughable to the South Carolina senator.[147]

Moments later, Senators Mason (Virginia) and Winthrop (Massachusetts) took over the debate of the question of whether free men ever were seized illegally in northern states by slave hunters. During these exchanges, Winthrop made a point (discussed earlier in this Article) that is central to understanding how the fugitive slave laws as they were interpreted by slave owners, slave hunters, southern law makers, judges and the Supreme Court in *Prigg*, justified a form of "profiling" based solely on race. Mason had pointedly questioned how anyone could know that a negro seized in a northern state could be free and not a slave. Winthrop replied: "In the first place, sir, our rule of presumption in Massachusetts is precisely opposite to that which I believe generally prevails in Virginia. We hold that every colored person is a freeman until he is

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[144] *Id.* app. at 1585 (remarks of Sen. Butler of South Carolina on August 19, 1850) (emphasis added).

[145] *Id.* app. at 1586 (remarks of Sen. Butler of South Carolina on August 19, 1850).

[146] *Id.* (remarks of Sen. Walker of Wisconsin on August 19, 1850).

[147] Walker also objected to Butler's "mirthful rejoinder" on the grounds that "[w]e see many advertisements in the papers where the persons described as fugitives from slavery are represented as being so white that it will be difficult to detect them on that account." *Id.*

proved to be a slave."[148]

This states the essential problem. The Constitution and the 1793 Act authorized seizures of people—who would be forced into slavery—when the ultimate justification for the seizures was the race of the captives. Much of the Senate debate focused upon the procedures that should be employed to protect the rights of the affected people. Northern senators offered amendments and arguments creating procedural rights for the alleged fugitives. Southern senators proposed legislation designed to protect the rights of slave owners.

Ultimately the South prevailed. The threat of dissolution of the Union weighed so heavily in the balance, particularly when measured against the interests of a generally powerless minority, that the Congress rejected attempts to enact a law providing even minimal due process for blacks seized as runaway slaves. Faced with the threat of secession (and perhaps civil war), lawmakers adopted measures designed to make it easier for slave catchers to obtain legal support for the recapture of runaways.[149]

During the debates, the Senate rejected proposed amendments that would have entitled captives to be tried by a jury, to have petitions for a writ of habeas corpus heard by a federal judicial officer, to have a uniform fee paid to the newly created federal commissioners who would decide the slave owners' claims, regardless of the outcome, and other measures consistent with fundamental notions of procedural justice. The result was a statute that attempted to abrogate any constraints on the capture of alleged runaway slaves and assured that federal officials would assist in the process of sending the captives south into slavery.

The 1850 Act included the following critical provisions. The Act created a new position of "commissioners" to be appointed in each federal circuit. These commissioners were granted the powers of "any justice of the peace, or other magistrate of any

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[148] *Id.* (remarks of Sen. Winthrop of Massachusetts on August 19, 1850).

[149] For many northerners, preservation of the Union was more important than concerns about the recapture of fugitive slaves. *See* MORRIS, *supra* note 89, at 135 (discussing Daniel Webster's position in the debate over the fugitive slave issue).

of the United States" in criminal matters,[150] and concurrent jurisdiction with district and circuit court judges over fugitive slave claims.[151] The explicit function of these new positions was to facilitate the use of federal law in the recovery of runaway slaves, although the Thirty-first Congress was as squeamish as the Framers about using the term "slave:"

> [T]he Circuit Courts of the United States . . . shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities *to reclaim fugitives from labor*, and to the prompt discharge of the duties imposed by this act.[152]
>
> [T]he commissioners . . . *shall grant* certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such *fugitives from service or labor* . . . to the State or Territory from which *such persons* may have escaped or fled.[153]

The new federal commissioners could issue warrants and other legal process, and also could "appoint . . . suitable persons . . . to execute all such warrants and other process."[154] But warrants were not required for seizing alleged fugitive slaves. The statute encouraged slave owners or their agents to seize people without bothering to get warrants. The slave catchers could "pursue and reclaim such fugitive person, either by procuring a warrant . . . or by seizing and arresting such fugitive, where the same can be done without process . . . ."[155] In other words, no warrant was necessary in most cases.

Whether seized with or without a warrant, the captive faced a federal proceeding structured to favor the slave owner. For example, the Act not only directed the new category of federal officers—commissioners—to grant certificates "upon satisfactory proof" by the claimant, but also offered the Commissioners a material incentive to decide that adequate proof

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[150] Act of Sept. 18, 1850, ch. 60, § 1, 9 Stat. 462, 462.
[151] *Id.* §§ 3-4.
[152] *Id.* § 3 (emphasis added).
[153] *Id.* § 4 (emphasis added).
[154] *Id.* § 5, 9 Stat. at 463.
[155] *Id.* § 6.

had been offered. Their fee was doubled in cases in which they ruled for the slave owner. In fugitive slave cases, the commissioners were to be paid a fee by the claimant of the alleged runaway. The fee was "ten dollars . . . in each case, upon the delivery of the said certificate to the claimant," but only "five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate . . . ."[156]

Contemporary doctrine recognizes that paying a judicial officer a higher fee for ruling against an accused person violates due process,[157] and so did northern senators who opposed this provision during the congressional debate more than 150 years ago. This provision was not an accident. It was included specifically to appease southern senators during the debate over the 1850 Act,[158] as were other rules enacted in the new law. Perhaps most significantly, the slave owner could "prove" his claim in an ex parte and summary proceeding. No jury was permitted, and a person declared a slave had no right of appeal.[159] The alleged fugitive even was prohibited from testifying.

Conversely, the slave owner could prove his claim that the captive was a slave simply by submitting an affidavit, deposition or "other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions *under the laws of the State or Territory*" from which the alleged slave had escaped.[160] In the alternative, the slave owner could

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[156] *Id.* § 8, 9 Stat. at 464.

[157] Connally v. Georgia, 429 U.S. 245 (1977) (declaring that paying judges higher fees in traffic court cases in which they ruled against the defendant than in cases in which they ruled for defendant was a violation of due process).

[158] CONG. GLOBE, *supra* note 83, app. at 1583 (noting that section 2 of the amendment to the bill offered by Senator Dayton on August 19, 1850 would have established a fixed fee of ten dollars for the commissioners in all cases regardless of outcome); *id.* app. at 1589 (reporting Senate vote rejecting the amendment).

[159] *See, e.g., id.* (noting that Senate rejected amendment to bill offered by Senator Chase that would have implemented various procedural protections for the alleged slave, including a jury trial); *id.* app. at 1589-90 (remarks of Senators Mason and Dayton) (debating the necessity or propriety of providing a right of appeal or right to seek a writ of habeas corpus by the alleged slave).

[160] Act of Sept. 18, 1850, ch. 60, § 6, 9 Stat. 462, 463 (emphasis added).

present evidence supporting his claim to a judge in the slave state, who could issue an authenticated transcript of the record of those proceedings. The fact record produced in this ex parte hearing in the slave state was binding in a subsequent federal hearing in a free state. That record was "full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party" claiming that the seized person was a runaway slave.[161]

The statute also adopted provisions designed to assist a claimant who had obtained a certificate from a federal commissioner or judge authorizing him to carry the captive back to slavery, both by confirming the right of the slaveholder to use force, and by enacting severe penalties for anyone obstructing the capture or return of the alleged runaway. The federal certificate authorized "such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped . . . ."[162] It imposed a fine of up to one thousand dollars, imprisonment of up to six months and civil damages of one thousand dollars for each slave who escaped or was freed, upon

> any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive form service or labor, either with or without process . . . or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting [them] . . . or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or la-

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[161] *Id.* § 10, 9 Stat. at 465.
[162] *Id.* § 6, 9 Stat. at 463.

bor . . . .[163]

To ensure that relevant law enforcers would assist the slave owner, the Act required that marshals enforce all warrants or other legal process issued pursuant to the statute. Any marshal refusing to enforce the orders, or even failing "to use all proper means diligently to execute" them, would be fined one thousand dollars, which was paid to the slave owner, not to the government.[164] If an alleged slave escaped from the custody of a marshal, "whether with or without the [marshal's] assent," the marshal would be liable "for the full value of the service or labor of said fugitive."[165]

The 1850 Act even gave those enforcing slave owners' claims powers reminiscent of those exercised by government agents under the writs of assistance so despised in the pre-Revolutionary colonies.[166] To enforce the capture and return of a runaway, the new federal commissioners and their appointees had the authority to "summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary . . . and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required . . . ."[167]

The Compromise of 1850 was just that; considering all of its elements, concessions were made by both northern and southern interests. But considered solely on its own terms, the 1850 Fugitive Slave Act amounted to a victory for slave owners and a legislative defeat for those opposed to the indiscriminate seizure of blacks in free states by slave hunters. The Act implicitly incorporated the southern presumption of slavery attached to race. It strengthened federal support for seizures based upon race so that Abraham Lincoln, who expressed support for the Compromise of 1850, would comment mordantly that the Fugitive Slave Act should be modified so that it would "not, in its stringency, be more likely to carry a free man into

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[163] *Id.* § 7, 9 Stat. at 464.
[164] *Id.* § 5, 9 Stat. at 462.
[165] *Id.* § 5.
[166] *See supra* note 30 and accompanying text.
[167] Act of Sept. 18, 1850, ch. 60, § 5, 9 Stat. 462.

slavery, than our ordinary criminal laws are to hang an innocent one."[168]

Whatever the likelihood that an innocent man would be hung in 1850, it seems beyond dispute that the other appalling crime did occur; free people were seized and carried into slavery. This was a process implicitly supported by federal law from the time of the Founders, who had been willing to accept slavery—and the loathsome methods used to hold people in servitude—in exchange for a new political system. One of those loathsome methods was the seizure of people because of their race. The Fugitive Slave Act of 1850 was appalling, in part because its lineage can be traced directly to the Founders.

IV. LESSONS

Elsewhere I have cautioned against crafting simplistic solutions for contemporary problems from complex legal histories.[169] That warning seems particularly apt for any effort to draw lessons for the current "war on terrorism" from events occurring more than two centuries ago. Nonetheless, the Founders' willingness to seize members of a religious minority in the midst of a wartime crisis, and their willingness to permit seizures of members of a disfavored racial minority to avert political catastrophe, warrant our attention. If we do not attempt to divine literal rules from these events, they offer some useful—if not always reassuring—insights about how we might view government "profiling" of members of religious and racial minority groups in the midst of the present crisis.

For example, it is apparent that collectively the Founders of our constitutional scheme accepted some seizures based upon group identity as necessary responses to national crises. If we accord the Founders' views any weight in twenty-first century constitutional analysis, then we must acknowledge that they accepted what we now label "profiling" as a legitimate response to nation-threatening crises.

Conversely, it is also apparent that even in the most dire

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[168] DAVID HERBERT DONALD, LINCOLN 181 (1995).

[169] *See* Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1743-47 (1996).

circumstances, this differential treatment of minority groups roused opposition. As a hostile army marched upon the seat of government, some political leaders still challenged seizures justified by the detainees' membership in a disfavored and mistrusted religious minority. The subsequent release of the Quaker prisoners was in part the product of a widespread concern about government seizures that conflicted with legal norms protective of individual rights. It was also the product of agitation by the prisoners and their supporters, who argued relentlessly that these seizures violated fundamental rights and established legal rules.

As noted earlier, these events suggest several broad lessons we might draw from the Founders' behavior. First, these events suggest that profile-based seizures are justified in times of extreme crisis. Second, they confirm that opposition to government seizures based upon a person's group affiliation are consistent with our great democratic traditions and should be honored as patriotic acts.

Finally, the relatively brief captivity of the Quakers suggests that the use of these methods should be terminated as quickly as possible. This last "lesson" may be the most difficult for us to apply today, because its application depends in part upon how we define the crisis used to justify otherwise unacceptable government conduct.

While the treatment of the Quaker prisoners seems to confirm that acceptance of "profiling" by the founding generation was tempered by a commitment to substantive and procedural rights of liberty and conscience, the way they defined the nature and scope of the crisis also seemed to contribute to the decision to release these captives. Political decision makers apparently defined the crisis narrowly (the invasion of Philadelphia) not broadly (the larger war with England). Once the British army left Philadelphia, the narrow crisis was over, the threat posed by the religious minority was abated and release of the captives was feasible. This outcome might have been different if the crisis had been defined as the larger military campaign that lasted for many years. Like the Japanese Americans imprisoned during World War II, the Quakers might have been held until the war's completion. Viewed from the

perspective of this issue, the treatment of fugitive slaves supplies a very different example.

If the seizures of Philadelphia Quakers in 1776 were incidental to a transient crisis, the Fugitive Slave Clause and the 1793 Act were responses to disputes about slavery that would continue for seven decades and would be resolved only in a bloody war. Seizures of runaway slaves were woven into the fabric of the nation's economic, social, political and legal institutions. It became impossible to eradicate this type of "profiling" without eliminating slavery.

The lessons this suggests for the present are troubling. If the crisis used to justify profiling in the "war against terror" is defined as a particular set of terrorist crimes—the September 11 attacks—then the use of profiling should end with the passing of the immediate crisis, as it did with the seizure of the Philadelphia Quakers during the Revolution. But if the crisis is defined as a continuing, and perhaps endless, struggle against terrorist acts committed by Islamic radicals, then the national security profiling proposed in the Justice Department guidelines could be used for decades.

A decades-long struggle with Islamic terrorists suggests a temporal parallel to the nearly eight decades that passed between ratification of the Constitution's Fugitive Slave Clause and ratification of the Thirteenth Amendment. Throughout most of that period, slavery's defenders claimed that efforts to end slavery, or to obstruct the recapture of fugitive slaves, or even to oppose the continuation (and extension into new territories) of slavery, created a crisis that would destroy the Union. This seemingly interminable political crisis justified a brutal form of profiling that authorized the seizure of blacks alleged to be runaway slaves.

If history teaches us that we should not be surprised that profiling happens in times of crisis, it also teaches that we need not readily accept the claims of its defenders, whatever their purposes may be. This does not mean that all profiling is equivalent. The relatively brief and comparatively benign incarceration of Quakers by national and state authorities during the Revolution may be an example of religious profiling, but it is hardly comparable to the racial profiling of runaway slaves,

and surely neither example is directly comparable to current attempts to protect us from terrorist crimes of violence. But that does not mean that we are obligated to accept the claims of government officials pressing to use these methods.

Like the citizens of earlier generations, we are entitled to protect our nation from destruction by our enemies. But like our political ancestors, we are entitled to resist claims by government leaders that they must be granted extraordinary powers to carry out that mission. Like those ancestors, we face an unknown future. But we do know that our nation can survive only if we have the courage to fight for it when it is threatened. And we should know by now that liberty can survive the exercise of government power only if we have the courage to fight for it as well.

USING RACE OR ETHNICITY AS A FACTOR IN ASSESSING THE REASONABLENESS OF FOURTH AMENDMENT ACTIVITY: DESCRIPTION, YES; PREDICTION, NO

David A. Harris[*]

I. INTRODUCTION

Of all of the modern United States Supreme Court opinions in constitutional criminal procedure, it is surely fair to say that few have proven to be as important as *Katz v. United States*.[1] Although the majority opinion in *Katz* was written by Justice Stewart, it is Justice John Marshall Harlan's concurring opinion that has become the rule governing the Fourth Amendment status of police actions—so much so that when we think of *Katz* it is first, and perhaps only, the Harlan concurrence, not the majority opinion, that we have in mind. In that famous concurrence, Justice Harlan supplied the formulation for how courts should judge whether a police action constitutes a search or seizure.[2] First, ask whether the defendant had "exhibited an actual (subjective) expectation of privacy."[3] If so, Justice Harlan said, ask whether that expectation is "one that society is prepared to recognize as 'reasonable.'"[4] The Harlan test spawned a host of decisions by the Court aimed at deciding whether particular police practices invaded reasonable expectations of privacy, including everything from airplane flyovers[5] to compulsory drug testing[6] to searches

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[1] 389 U.S. 347 (1967).

[2] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[3] *Id.*

[4] *Id.*

[5] California v. Ciraolo, 476 U.S. 207, 211 (1986).

[6] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-18 (1989).

using the newest technologies.[7]

Nevertheless, there were signs toward the end of his career that Justice Harlan had had second thoughts about his *Katz* concurrence. These misgivings surfaced in Justice Harlan's dissenting opinion in *United States v. White*.[8] In *White*, an informant wearing a transmitting device had several conversations with the defendant that were broadcast to government agents.[9] At trial, the government sought to use the conversations against the defendant; since the informant had disappeared, the government introduced the conversations into evidence through the testimony of the agents who heard it over the transmitter.[10] Based on Justice Harlan's *Katz* test and on other cases that discussed the risk of the betrayal of the privacy of conversations by government informants as a risk that all citizens assume, a plurality ruled that the defendant had assumed the risk that the person he was talking to would betray him.[11] In addition, the Court said, the defendant had no reasonable expectation of privacy as to his private conversation with the informant.[12] Justice Harlan found this unsatisfactory.[13] The most interesting part of his dissent comes near its end. He was not entirely satisfied that the Court should simply compare what police did to existing expectations of privacy in society.[14] Justice Harlan thought they should do more.

> The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.
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> Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite

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[7] Kyllo v. United States, 533 U.S. 27, 27-28 (2001).
[8] 401 U.S. 745, 768-95 (1971) (Harlan, J., dissenting).
[9] *White*, 401 U.S. at 746-47 (plurality opinion).
[10] *Id.* (plurality opinion).
[11] *Id.* at 752 (plurality opinion).
[12] *Id.* at 751-52 (plurality opinion).
[13] *Id.* at 768-95 (Harlan, J., dissenting).
[14] *Id.* at 786 (Harlan, J., dissenting).

> the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.[15]

Generalizing beyond the specifics of *White*, Justice Harlan seemed to want us to understand that, in the context of making decisions under the Fourth Amendment, it is not enough to simply ask what society expects *now*, or what the law is *at this moment*. The answers to such questions may be no more than interfacing reflections of the same thing and, perhaps more importantly, they tell us little about the desirability of new types of police conduct that we face now, and that we will face in the future. In other words, at least as important as asking what the law and society's expectations of privacy *are* is asking what they *ought to be*. When we assess a new variety of potentially intrusive police conduct, we should ask not just whether the current law and our current expectations permit it, but whether they *should* permit it. We should, Justice Harlan implies, be asking the larger question: just what kind of society do we want to have?

As we ponder the role that race and ethnicity play in assessing the reasonableness of searches and seizures, Justice Harlan's words in *White* seem almost eerily prophetic. It is a relatively simple matter to assess whether the law, as it stands, allows law enforcement to use race or ethnicity as indicators of suspicious Fourth Amendment activity. The Court set down its rule on this question almost thirty years ago: yes, ethnic or racial characteristics can serve as legitimate causes for suspicion in at least some limited category of situations.[16] The Court has never changed this rule, and in fact has shown that it sees no reason to do this. But Justice Harlan's words obligate us to look further, to ask what the law on this important question should be.

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[15] *Id.* (Harlan, J., dissenting).

[16] *See infra* notes 23-36 and accompanying text.

It is an understatement to call this question delicate, important and visible to the larger public. In the late 1990s and all the way into 2001, the issue of racial profiling—the use of race by police as one factor among others in deciding whom to stop, question and search—became a matter of widespread public concern. Polling data showed that almost sixty percent of the American public—not just African Americans and Latinos, who had most frequently found themselves the victims of racial profiling, but Americans of all races and ethnicities—knew what racial profiling was and considered it to be widespread.[17] Additionally, eighty-one percent of those polled disapproved of the practice.[18] Agreement of over eighty percent on *anything* in the United States today represents a strong consensus; on an issue involving race, it is almost unheard of. But after the terrible terrorist attacks of September 11, 2001, this consensus shifted dramatically. In the post September 11 environment, polling data again pointed to sixty percent of Americans. But this time, the message was different. Almost sixty percent of Americans—including African Americans and Latinos—now thought racial profiling was acceptable and even necessary as long as those under observation were Arabs and Muslims at airports.[19] This thought, that profiling of Arabs and Muslims was both necessary and made obvious common sense, was heard not only around office water coolers and at kitchen tables, but in writings in the most influential publications in the nation.[20] And it is not hard to understand why. All nineteen of the suicide hijackers of September 11 were from one narrow demographic group: they were young Muslim

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[17] GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1999, at 238 (2000).

[18] *Id.*

[19] Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, THE GALLUP POLL MONTHLY, Sept. 2001, at 52-53; Jason L. Riley, *Racial Profiling and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22.

[20] Stanley Crouch, *U.S. Must Stay Tough About Sealing Borders*, N.Y. DAILY NEWS, Mar. 16, 2001, at 41; Jonah Goldberg, *Profiles in Profiling*, NAT'L REV., Nov. 14, 2001, *available at* http://www.nationalreview.com/goldberg/goldberg111401.shtml; Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 18, 2002, at 104; Kathleen Parker, *All is Fair in This War Except for Insensitivity*, CHI. TRIB., Sept. 26, 2001, at 19.

men from the Arab world. How could it *not* make sense to target our enforcement efforts at these same people? Thus, the question we address at this symposium has a remarkable currency, and a strong salience to people far beyond the walls of academia. *It matters*, in a profound sense; whether or not we take race or ethnic appearance into account in assessing the reasonableness of Fourth Amendment activity will affect our safety and our society quite directly. And that, of course, makes Justice Harlan's message to us all the more important, maybe more important than it has ever been. All of us—not only judges, but scholars, policy makers and citizens—must ask not only what society expects and the law permits, but what we *should* expect and permit. In short, we cannot be satisfied with asking whether the law would allow us to use race or ethnicity to assess suspicion; we must ask whether this is desirable. And of course, in so doing, we ask the larger questions. At a time when we face perhaps the most profound threat to our safety imaginable—the undeterrable killer bent on mass murder—we must ask what kind of law enforcement our society should have. These are not easy times, and this is not an easy question. But there is no escaping our duty to ask.

Giving these questions careful thought is not easy in a time of great (and justified) fear, especially when the highest officials in our government discourage any dissension from their actions by declaring that opinions and assertions that do not support their law enforcement tactics "only aid terrorists."[21] Nevertheless, these issues must be confronted if we are to do our best to be safe from the terrorists, and to retain what is best for our society and most important to our constitutional values. Clear thinking on the use of race and ethnicity produces answers that run counter to the conventional wisdom. Race or ethnic appearance should be used as criteria for assessing the reasonableness of Fourth Amendment activity in only a limited way. Race or ethnic appearance can and should be used to describe a known suspect or suspects—that is, to tell law enforcement officers and the public

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[21] *Excerpts From Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6.

what particular suspects look like. But race or ethnic appearance should *not* be used in efforts to predict who might be involved in unknown criminal behavior. Race as a description helps to ensure public safety by focusing law enforcement officers on real targets and giving them a way to eliminate most other people as suspects. Race used as a predictor hinders law enforcement, blunting its effectiveness in real and measurable ways, even as it offends important constitutional principles and creates the most difficult moral problems. In short, using race as a predictor is not a good tool for police. It is a legal, moral and practical dead end.

Section II begins with a brief discussion of what the law is on the use of race in the Fourth Amendment context. Section III then moves us into the center of the matter: what should the law be on this important question? It begins with a discussion of the legal and historical underpinnings of the Fourth Amendment, moves to a discussion of the moral difficulties of using race as a predictor of criminal behavior and then illuminates the practical dimensions of the problem, arguing that using race or ethnicity to assess the reasonableness of Fourth Amendment activity will make it more difficult for law enforcement agencies to make us safe and to secure our freedoms as Americans. Section IV will attempt to apply the description/prediction dichotomy to a difficult example: the facts of the troubling case of *Brown v. City of Oneonta*.[22]

II. WHAT THE LAW IS: *BRIGNONI-PONCE*, *MARTINEZ-FUERTE*, AND *WHREN*

The first question is whether the law, as it stands, allows the use of race or ethnicity in assessing the reasonableness of Fourth Amendment activity. The answer is yes. The Supreme Court's Fourth Amendment decisions do indeed allow law enforcement to use race or ethnicity to decide whether an individual is suspicious enough to justify a search or seizure. In fact, the Court has actually taken the Fourth Amendment out of the equation by allowing police practices that almost certainly

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[22] 221 F.3d 329 (2d Cir. 2000).

involve racial bias in law enforcement without any Fourth Amendment challenge. The Supreme Court has, at best, marginalized concerns about race-based enforcement; at worst, it might be said to have encouraged it.

A. Brignoni-Ponce *and* Martinez-Fuerte

The Court's clearest statement on the use of race or ethnic appearance came more than twenty-five years ago, in a pair of cases involving stops of illegal immigrants near the U.S.-Mexican border in Southern California. In the first of these cases, *United States v. Brignoni-Ponce*,[23] the government charged the defendant with knowingly transporting illegal immigrants.[24] Border patrol agents on "roving patrol," looking for suspected illegal immigrants from a patrol car, not a fixed checkpoint, arrested the defendant after they stopped him and discovered that both of his passengers had entered the country illegally.[25] The border patrol agents candidly admitted that they stopped the car for one reason only: the occupants "appear[ed] to be of Mexican ancestry."[26] Though the stop was brief, the Justices still characterized it as a seizure for Fourth Amendment purposes.[27] The Court found the justification for the stop of the defendant—that the occupants of the car looked Mexican—to be far too thin to accept.[28] Given the government's important interest in policing the border against illegal immigration, the minimal intrusion imposed by a brief stop, and the lack of any practical alternative, the Court said that an officer conducting a roving patrol may briefly stop and question the driver and passengers of a vehicle, as long as the officer's observations lead him reasonably to suspect that the vehicle contains illegal

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[23] 422 U.S. 873 (1975).

[24] *Brignoni-Ponce*, 422 U.S. at 875.

[25] *Id.* at 874-75.

[26] *Id.* at 876. The Court noted that the Government attempted to argue that there were other factors that supported the stop, including the location of the encounter near the Mexican border. *Id.* at 886 n.11. But the Court would have none of it, describing this as an "after-the-fact justification" unsupported by any evidence or even a bare assertion in the trial court. *Id.*

[27] *Id.* at 880-83.

[28] *Id.* at 885-86.

aliens.[29] The Court said that the questioning can include immigration status and suspicious circumstances observed by the officer.[30] These stops cannot, however, occur without any evidence raising suspicion; the officer must have at least some fact-based reason to consider the vehicle and its occupants suspicious.[31] Most importantly for purposes of this discussion, the Court took care to say that reasonable suspicion could not rest entirely on the Mexican appearance of the suspects.[32] That one factor alone could not serve as sufficient legal justification for a brief detention: "standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens."[33]

But even as it declared ethnic appearance off limits as the basis for reasonable suspicion, the Court carefully noted in *Brignoni-Ponce* that, when combined with other factors, racial or ethnic features might be an acceptable way to judge the reasonableness of a search or seizure.[34] The Court said that, even though "[l]arge numbers of native-born and naturalized [American] citizens have the physical characteristics identified with Mexican ancestry" and even though relatively few of them are aliens, a court might legitimately take ethnic appearance into consideration as one factor among others in deciding whether police had reasonable suspicion sufficient to make a stop.[35] After all, the Court stated, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[36] Thus, while *Brignoni-Ponce* appears to restrict the use of ethnic appearance as a factor in deciding whether reasonable suspicion exists, it actually does so only in the most narrow sense: in situations where ethnic appearance is the only factor involved. And it leaves the door open to using ethnic appearance when it is

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[29] *Id.* at 881-82, 884.
[30] *Id.* at 881-82.
[31] *Id.* at 884.
[32] *Id.* at 887.
[33] *Id.*
[34] *Id.* at 886-87.
[35] *Id.*
[36] *Id.*

among several factors.

Just one term later, the Court found itself presented with the very question it left open in *Brignoni-Ponce*: could ethnic appearance form the basis of reasonable suspicion when it was not the only factor, but one of several factors? *United States v. Martinez-Fuerte*[37] presented the Court with facts just marginally different than those in *Brignoni-Ponce*. Again, the setting was Southern California and again, the issue concerned policing the U.S. border against illegal immigration from Mexico.[38] However, there was one important difference: the defendants were stopped and apprehended not by a roving patrol, but at a fixed checkpoint—a well-designated place on the road at which vehicles must slow down and stop for brief observation by law enforcement personnel.[39] This observation, or "screening," was done in the open, with officers and their equipment visible and signs posted.[40] The screener could then choose to send the vehicle and its occupants to an area for a secondary screening, which included a brief detention and questioning.[41]

The Court considered the difference between the roving patrol in *Brignoni-Ponce* and the fixed checkpoint in *Martinez-Fuerte* to be a critical factor in its decision on an important issue: unlike roving patrols which required some modicum of fact-based suspicion to allow a stop, fixed checkpoints did not require any individual suspicion.[42] Police officers need not have any reason to suspect any particular vehicle or its occupants of involvement in wrongdoing in order to make a brief stop at a fixed checkpoint.[43] More important for this discussion, however, is that the Court made clear that the Mexican appearance of the vehicle's occupants could play a role in sustaining a claim that law enforcement officers had had reasonable suspicion to make a stop; it was permissible for race to be

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[37] 428 U.S. 543 (1976).
[38] *Martinez-Fuerte*, 428 U.S. at 545.
[39] *Id.* at 545-46.
[40] *Id.*
[41] *Id.* at 546.
[42] *Id.* at 560-62.
[43] *Id.* at 562.

one of several factors.[44] "[I]t is constitutional," the Court said, "to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[45] The Court erased any lingering doubt on the issue by citing directly to *Brignoni-Ponce*'s tentative and hypothetical answer to the question.[46] Thus, after *Martinez-Fuerte* the law was clear. A person's ancestry, as manifested in his appearance, could indeed form at least part of the basis for a decision about whom to stop, question and search. In fact, suspicion might be based "largely" on ethnic appearance.[47] The Constitution did not prohibit this.

B. United States v. Whren

If *Brignoni-Ponce* and *Martinez-Fuerte* tell us a lot about whether the law allows the use of race or ethnic appearance to assess suspicion, the case of *United States v. Whren*[48] helps complete the picture. What *Whren* tells us about the use of race to show reasonable suspicion is perhaps more oblique than what we learned from *Brignoni-Ponce* and *Martinez-Fuerte*, but it is no less important.

Whren involved a scenario familiar to both scholars of criminal law and to police officers: a drug bust based on a traffic stop. In *Whren*, police officers observed two young black men[49] in a Nissan Pathfinder sport utility vehicle with temporary license tags.[50] The officers saw no evidence of criminal activity, but they were suspicious enough to use a traffic offense they saw the driver commit as a reason to pull the car over.[51] The officers admitted that they had no interest in traf-

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[44] *Id.* at 563.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 517 U.S. 806 (1996).
[49] *Whren*, 517 U.S. at 810.
[50] *Id.* at 808.
[51] *Id.*

fic enforcement.[52] Moreover, the regulations of their department prohibited plain clothes vice officers like themselves, and any officers driving unmarked vehicles, from doing traffic enforcement except in the most extreme circumstances.[53] Their purpose was to investigate the possibility that the two occupants of the vehicle were involved in crime, and they used traffic enforcement as a pretext to detain them.[54] The Supreme Court held that this use of a pretext to "fish" for evidence did not violate the Fourth Amendment.[55] As long as the officers had, in fact, observed a traffic violation, they had full, adequate and complete probable cause to stop the vehicle.[56] The fact that the traffic violation may have been nothing more than an excuse for the stop, that the officers may have been manifestly uninterested in traffic enforcement, or even that no reasonable officer would have made such a traffic stop, made no difference.[57] As long as the officers could have stopped the defendant for a traffic violation, the actual reason for the stop remained immaterial.[58] The Fourth Amendment, the Court held, did not preclude the use of such a pretext.[59]

Just as important as allowing "fishing," the Court was confronted with two critical arguments from the defendants. First, the defendants said that state traffic codes were so detailed and that the codes regulated driving and vehicles to such a degree that no driver could avoid committing some offense.[60] This would mean that if any traffic offense could be used as a pretext, officers would effectively have nearly unlimited discretion to stop any vehicle, any time they chose.[61] The Justices were not persuaded by this argument; they were simply unwilling, they said, to draw lines indicating which kinds of offenses

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[52] *Id.* at 809.

[53] *Id.* at 815 (citing Washington, D.C., Metropolitan Police Department regulations to this effect).

[54] *Id.* at 809.

[55] *Id.* at 812-13.

[56] *Id.* at 809.

[57] *Id.* at 817-18.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 810.

[61] *Id.*

could warrant a stop.[62] Second, and more importantly, the defendants argued that there was every reason to expect that traffic enforcement imbued with such an immense amount of discretion would inevitably result in racially-biased law enforcement.[63] They presented the Justices with statistical evidence that this had indeed been occurring in at least one other jurisdiction in similar situations.[64] The Court dismissed this contention with a bland wave of its judicial hand. If the defendants could indeed show that police used racially-biased law enforcement tactics, the officers' actions would violate the Constitution.[65] But the proper avenue of redress for such conduct was not the Fourth Amendment and its exclusionary rule.[66] Rather, defendants should bring a civil lawsuit alleging a violation of the Equal Protection Clause.[67] In other words, while using racially-biased law enforcement tactics was not permitted under the Constitution, a motion to suppress under the Fourth Amendment was not the way to address the violation.[68] As a result, courts hearing criminal cases would no longer play any role in scrutinizing the alleged use of stops and searches in a racially discriminatory fashion. That would be left to courts hearing civil complaints. And given the difficulty of filing—and winning—such cases, there would likely be very few of them.

Thus, as we ask what the law is regarding whether police can use race or ethnic appearance to assess the reasonableness of Fourth Amendment intrusions, the answer is not all that difficult to figure out. Yes, race or ethnic appearance can indeed play a role in at least certain situations to assess possible suspects, as long as it is not the only factor in doing so. And the courts cannot do anything in a criminal action to address the use of race or ethnic appearance, at least as far as suppressing evidence under the Fourth Amendment. Given how

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[62] *Id.* at 818-19.
[63] *Id.* at 810.
[64] *Id.* at 812.
[65] *Id.* at 813.
[66] *Id.*
[67] *Id.*
[68] *Id.*

difficult it will be for plaintiffs to obtain redress in a civil action, the Court has sent police departments a message: no, it is not legal to use race or ethnic appearance by itself to assess whether or not someone is suspicious, but you can do it if you consider any other factors along with it. And if you do use race or ethnic appearance alone, don't worry too much. There is a risk of a lawsuit, but it is vanishingly small.

III. What The Law Ought to Be: When Should We Consider Race an Acceptable Factor in Judging Reasonable Suspicion?

If it is relatively easy to understand what the law is on the use of race to assess suspicion, what the law ought to be is both considerably more complex and of far greater importance. Law enforcement may properly use race in deciding whether or not reasonable suspicion exists when race comes from a description of a known suspect. In such a situation, race becomes part—a vital part—of a particularized reason for individual suspicion. This is not only good police work; it is good for society in general. By way of contrast, race should not be used as an indicator of suspicion when it is used as a predictor—that is, a factor in deciding which person in a group of strangers is more likely than others to be involved in some as-yet-unknown crime. In the latter situation, race is used as a proxy to indicate a greater propensity to be involved in crime, based on statistical prediction. This use of race represents a profound mistake—in the sense of both police work and policy. In the following sections of this paper, I will attempt to justify this "description versus prediction" rule on three bases. First, law and history demonstrate that the Constitution permits using race only as a description. Using race as a predictor runs directly contrary to the history and purposes of the Fourth Amendment. Second, a powerful moral argument makes clear that, even if using race as a predictor has some statistical basis, using race this way is profoundly wrongheaded. Third, using race as a predictor of suspicion fails to make any practical contribution to policing. Rather, race as a predictor of criminality does not provide the boost to policing that its proponents usually claim. Predicting criminal behavior with race actually damages policing, making

it less effective and driving a wedge between law enforcement officers and those they serve. And in this time of special risk from terrorism on our own soil, using race as a predictor is a mistake we simply cannot afford to make.

A. The Legal Argument: The History of the Fourth Amendment and the Requirement of Individualized Suspicion

1. The Meaning of the Fourth Amendment: Disjunctive vs. Conjunctive Theories of the Text

The legal argument concerning the use of race to indicate suspicion must begin with the central question in Fourth Amendment jurisprudence: what does the Fourth Amendment mean? The last few years have seen a lively academic debate concerning the meaning of the Amendment, most of it centered on the relationship of the Amendment's two clauses. The first clause says that the "persons, houses, papers, and effects" of the people are to be secure against unreasonable searches.[69] The second clause, joined to the first by the word "and," specifies the requirements the government must meet for the issuance of search warrants: probable cause, sworn allegations describing the facts supporting probable cause and specific descriptions of the persons, objects or places to be searched or seized.[70] Essentially, the debate boils down to whether the requirements of the second clause should be read to apply to all searches and seizures. If they did, most searches would require warrants, and even those excepted from this general rule would require probable cause based on specific facts. In other words, searches would have to conform to the requirements of the second clause in order not to be considered (using the terminology of the first clause) unreasonable. Justice Frankfurter may have been the most prominent proponent of this view.

> These words are not just a literary composition. . . . One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. . . . When the Fourth Amendment outlawed "unreasonable searches" and

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[69] U.S. CONST. amend. IV, cl. 1.

[70] *Id.* at cl. 2.

> then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."[71]

Others disagree. Telford Taylor, whose work on the question[72] has gained prominence from the fact that it has been relied on by Akhil Amar,[73] has argued that the framers of the Fourth Amendment meant for it to limit the issuance of warrants.[74] According to this view, the framers were not at all concerned about warrantless searches.[75] Thus, the argument goes, the Fourth Amendment does not mandate that most searches require warrants.[76] Taylor views the two clauses of the Amendment as distinct.[77] The first requires only that searches and seizures be reasonable, and the second specifies how law enforcement shall conduct searches with warrants.[78] Nothing in the Amendment indicates when warrants are to be used, or what factors will support a finding that a search or seizure is reasonable.[79] According to those who accept Taylor's view, the question is not whether it was reasonable to obtain a warrant, but "whether the search itself was reasonable."[80] The answer to that question, in turn, depends on the facts of each

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[71] United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting) (citations omitted).

[72] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

[73] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (relying on Taylor and dedicated to Taylor).

[74] TAYLOR, *supra* note 72, at 44-46.

[75] Amar, *supra* note 73, at 761-62.

[76] *Id.* at 761.

[77] *Id.* at 762; *see also* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 521 (1995).

[78] Amar, *supra* note 73, at 762; Clancy, *supra* note 77, at 521-22.

[79] Amar, *supra* note 73, at 761-64.

[80] Clancy, *supra* note 77, at 522 (citing United States v. Rabinowitz, 339 U.S. 56, 66 (1950)).

case; whether or not a warrant was obtained is just one of the facts to be weighed in determining reasonableness. This interpretation of the meaning of the Fourth Amendment means, effectively, that judges evaluating the constitutionality of any particular search or seizure are left free to supply the content of the idea of what is reasonable according to how they see any particular case.[81] A majority of the Supreme Court has put it this way:

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.[82]

The Supreme Court's current majority subscribes to this "disjunctive" theory. Instead of searching for the characteristics of reasonable searches and seizures as described in the warrant clause, the Court now believes that whether a particular search is reasonable "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[83]

2. The Centrality of Individual Suspicion

This is clearly a dispute of great significance, but it overlooks something important: the core concept of the Fourth Amendment is not which clause should govern, but the requirement of individualized suspicion for any Fourth Amendment intrusion. In other words, history shows that the framers would have required all searches and seizures, whether or not they were based on a warrant, to be based on particularized, individual suspicion. William Cuddihy provides a new contribution to the debate over the Fourth Amendment's meaning—a scholarly work that Justice O'Connor has called "one of the most exhaustive analyses of the original meaning of the Fourth

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[81] Amar, *supra* note 73, at 769.
[82] *Rabinowitz*, 339 U.S. at 63.
[83] *E.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

Amendment ever undertaken"[84] (Justice O'Connor cited it approvingly thirteen times in just a few pages of one of her opinions).[85] In his work, entitled *The Fourth Amendment: Origins and Original Meaning*,[86] Cuddihy has done the hard, tedious and thorough work of digging and sifting through historical materials to find the Amendment's core. Cuddihy's work—three volumes, with 1560 pages of text and footnotes as well as additional pages of appendices, tables and the like—is a masterwork of thoroughness, detail and scope, even if the reader sometimes wishes for better editing and organization.[87] Cuddihy has much to say about the debate over the clauses of the Fourth Amendment. But it is another, related aspect of Cuddihy's history of the Fourth Amendment that illuminates the question of how we should use race to assess suspicion in police investigation. The historical record, Cuddihy asserts, strongly supports the idea that the Fourth Amendment was intended to limit government action and discretion to conduct not just searches and seizures *with* warrants, but a wide variety of searches and seizures *without* warrants.[88]

Cuddihy points out the importance of individual suspicion—the idea that the authorities had to have reasons for suspicion that centered on particular individuals by virtue of their conduct. Long pre-dating the Fourth Amendment, there existed in England not only the idea that searches and seizures could be unreasonable, but that particularized suspicion was absolutely required in order for a search or seizure to be considered reasonable.[89] Cuddihy finds evidence that these intrusions required some type of particularized suspicion as far back

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[84] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting)

[85] *Acton*, 515 U.S. at 669-73.

[86] William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

[87] *E.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1713, 1720 (1996) (making explicit mention of work's great length and insufficient organization, stating that "no other important history so needs an editor.").

[88] Cuddihy, *supra* note 86, at civ.

[89] *Id.* at 854.

as the thirteenth century.[90] Professor Tom Clancy, director of the National Center for Justice and the Rule of Law at the University of Mississippi School of Law, has written persuasively about the importance of individualized suspicion to both the history of the Fourth Amendment and our current struggle over the meaning of the Amendment's two clauses as they relate to the question of what searches and seizures are reasonable.[91] Professor Clancy explains the importance of individualized suspicion this way:

> The requirement of some level of individualized suspicion operates to limit the government's discretionary authority to search and seize. Individualized suspicion, also called particularized suspicion, serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion. It places the focus of the inquiry concerning the permissibility of a search or seizure upon the circumstances presented by the private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude.[92]

Like Cuddihy, Clancy sees the importance of looking at the full historical context of the Fourth Amendment in order to have a real understanding of its meaning. According to Clancy, we must look at the events that preceded the drafting of Constitution and the Bill of Rights, most particularly the search and seizure practices of the time.[93] With only limited exceptions, Clancy says, "there was no right to search or seize without a warrant. The exceptions to the use of the warrant . . . required individualized suspicion of criminal activity to justify the search or seizure."[94] The "core complaint" of the framers revealed by a close study of history, Clancy notes, was not that the searches or seizures to which the authorities subjected the framers did or did not utilize warrants or other kinds of au-

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[90] *Id.* at 853-54.
[91] Clancy, *supra* note 77, at 483.
[92] *Id.* at 485 (footnotes omitted).
[93] *Id.* at 526.
[94] *Id.* at 527.

thority. Rather, "it was the general, suspicionless nature of the searches and seizures."[95] Therefore it is not surprising that among the most fundamental of the principles held by the framers in this connection was the requirement of particularized, individual suspicion.[96] The warrant clause of the Fourth Amendment, Clancy explains, spelled out the requirements of a warrant as a way not just of regulating searches with warrants, but of making explicit what the requirements of a reasonable search were.[97] Thus, the historical context reveals that the warrant clause not only served to describe what a warrant must contain, but also to protect the colonists from all types of suspicionless searches and seizures.

> By so prescribing the requirements of a search pursuant to a warrant, the framers were seeking to ensure that freedom from suspicionless intrusions was guaranteed. Thus, for the former colonists, particularized suspicion of wrongdoing was an irreducible minimum for a search or seizure. . . . [They] believed individualized suspicion to be an inherent component of the concept of reasonableness.[98]

Clancy's conclusions dovetail particularly well with Cuddihy's. Ranging "far beyond the commonly cited sources," like the writs of assistance cases in Massachusetts, the English cases of the 1760s concerning general searches for publications that criticized the government, and the few pieces of evidence concerning the drafting of the Amendment itself to present "an overwhelming documentary record" spanning centuries, Cuddihy shows that Clancy's broad conception of the Fourth Amendment is correct.[99] "Many kinds of searches and seizures were unreasonable within the original meaning of the amendment, not just general warrants," among them warrantless general searches and warrants allowing searches of multiple locations.[100] The idea that particularized suspicion was an ab-

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[95] *Id.* at 528.
[96] *Id.*
[97] *Id.* at 528-29.
[98] *Id.* at 529-30.
[99] Cloud, *supra* note 87, at 1716.
[100] Cuddihy, *supra* note 86, at civ.

solute requirement of any reasonable search preceded the American Revolution by hundreds of years.[101] The Fourth Amendment's banning of the general warrant addressed not only that particular device, but rather was part and parcel of "a larger scheme to extinguish general searches categorically."[102] By the 1770s and 1780s, Cuddihy says, colonial critics protested all types of general searches, with or without warrants.[103] Professor Morgan Cloud, who has studied Cuddihy's work carefully, notes that Cuddihy's extensive review of the historical record in the years immediately before the drafting of the Fourth Amendment "supports [Cuddihy's] conclusion that a consensus began to emerge rejecting broad categories of searches and seizures as unreasonable, including general searches conducted with or without warrants. . . . All were included within the meaning of unreasonable searches and seizures in the Amendment, although the text only specified general warrants."[104] Thus both Clancy and Cuddihy help us understand that in order to be true to the Fourth Amendment's purposes and its history, searches or seizures, whether with or without warrants, must be based on individualized, particular suspicion. Mere group membership, or the idea that some suspicion inheres in a particular situation, will not do.

The historical baseline requirement that government officials have individualized suspicion has been repeated and reemphasized enough times by the modern Supreme Court that it remains good law, even in the face of a number of cases that seem to dispose of the individual suspicion requirement in favor of a balancing of interests test. In the modern era, one first sees the requirement of individualized suspicion strongly emphasized in *Terry v. Ohio*, the case that, ironically, also brought the "balancing of interests" view to real prominence.[105] Scholars of constitutional criminal procedure know *Terry* as the case that gave the Supreme Court's imprimatur to searches and seizures performed with less than probable cause.

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[101] *Id.* at 1499.
[102] *Id.*
[103] *Id.* at 1486, 1499-1500.
[104] Cloud, *supra* note 87, at 1724.
[105] 392 U.S. 1 (1968).

In situations where a police officer had reasonable, articulable suspicion (a standard not quantified in any solid way by the Court, but clearly meant to require less evidence than the probable cause standard would) that crime was afoot and that a person under observation was involved in it, the police officer could temporarily detain a suspect.[106] If the officer suspected the presence of weapons, she could perform a cursory search of the defendant to confirm or dispel that suspicion.[107] The Court explicitly balanced the intrusion of a stop and frisk on the individual against the need of the government for this kind of investigatory tactic; one can argue from this that *Terry* marked the beginning of the use of what eventually became the reasoning that has justified suspicionless searches in any number of situations.[108] Nevertheless, the Court's opinion in *Terry* explicitly restated the importance of individualized suspicion in assessing the reasonableness of searches and seizures under the Fourth Amendment.[109] Reasonable suspicion, the Court said, means something more than a hunch or a gut feeling about a person the police observe. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[110] The Court punctuated this demand for specific, individualized suspicion as a basis for Fourth Amendment intrusions with a simple, clear footnote: "[T]his demand for specificity in the

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[106] *Terry*, 392 U.S. at 28.

[107] *Id.* at 24.

[108] *Id.* at 20.

> [T]he conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. . . . In order to assess the reasonableness of [the police officer's] conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."

Id. at 20-21 (citing Camara v. Mun. Court, 387 U.S. 523, 534-37 (1967)).

[109] *Id.* at 24.

[110] *Id.* at 20-22.

information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[111] It anchors this unambiguous statement by citing no fewer than thirteen of its own search and seizure cases dating from the 1920s, 1930s, 1940s, 1950s and 1960s, and even one from the 1870s—an unbroken line of decisions reflecting and restating this core Fourth Amendment requirement.[112]

The Court reaffirmed this position strongly over a decade later in *United States v. Cortez*.[113] In a case involving the temporary detention of a suspect involved in possible illegal immigration, the Court re-examined the level of suspicion required for a *Terry* stop.[114] The terms that courts had used to describe the amount of evidence required—"founded suspicion" and "articulable reasons," for example—are not, the Court said, "self-defining."[115] Any assessment must look at all of the circumstances: "the whole picture," in the words of the Court.[116] And that whole picture must contain facts sufficient to give the officer individualized suspicion about the suspects: "Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."[117] This process of assessing suspicion, the Court said, "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing."[118] Quoting directly from *Terry*'s critical footnote, the majority in *Cortez* chose to speak emphatically: "Chief Justice Warren, speaking for the Court in Terry v. Ohio, supra, said that '[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'"[119] The Supreme Court

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[111] *Id.* at 21 n.18.
[112] *Id.*
[113] 449 U.S. 411 (1981).
[114] *Cortez*, 449 U.S. at 414-16.
[115] *Id.* at 417.
[116] *Id.*
[117] *Id.* at 417-18.
[118] *Id.* at 418.
[119] *Id.* (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)) (emphasis in original).

went to considerable lengths to reaffirm the requirement of individual suspicion in the 1990s in *Minnesota v. Dickerson*.[120] *Dickerson* involved the propriety of a *Terry* "pat down" search.[121] Writing for the majority, Justice White used the case to restate and reaffirm the Court's commitment to the principles of *Terry*. The police officer, Justice White said, must be able to point to specific facts indicating that the suspect may be involved in crime and may be armed in order to perform a stop and frisk.[122] More importantly, those facts may not be general indications of suspicion; rather, they must demonstrate that the particular individual seems suspicious.[123] And in *Illinois v. Wardlow*,[124] an even more recent case, the Court repeated the requirement of individual suspicion. Even as it allowed the police to make a *Terry* stop based on a very small, arguably ambiguous set of factors,[125] the Court said in *Wardlow* that suspicion must concern individual suspects.[126]

But by the end of the 1980s, one could see the development of a countertrend in the Court's Fourth Amendment cases. In these cases, which the Court put under the rubric of "administrative searches," the Court began to use a balancing test in which it weighed the interests of the government against those of individuals, instead of requiring particular, individualized suspicion. These cases involved "needs beyond those of ordinary law enforcement;"[127] they often concerned intrusions on large groups of people without any suspicion at all. For example, in

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[120] 508 U.S. 366 (1993).

[121] *Dickerson*, 508 U.S. at 373.

[122] *Id.*

[123] *Id.* "Terry further held that '[w]hen an officer is justified in believing that *the individual* whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' the officer may conduct a patdown search . . . ." *Id.* (quoting *Terry*, 392 U.S. at 24) (emphasis added).

[124] 528 U.S. 119 (2000).

[125] The Court upheld a *Terry* stop on the basis of just two factors: presence in an area known for drug sales, and flight upon seeing police. *Wardlow*, 528 U.S. at 124-25.

[126] *Id.* at 124-26 (holding that facts, even those consistent with innocence, must show that officers have reasonable suspicion that suspect under observation is involved in crime).

[127] *See, e.g.,* Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001).

Skinner v. Railway Labor Executives' Ass'n,[128] the Court allowed the suspicionless testing of railroad employees involved in accidents, given the great danger to public safety, the frequent presence of drugs and alcohol as a factor in such accidents, the absence of any other practical way to ascertain the cause of these accidents and the relatively minor intrusion imposed by alcohol and drug testing.[129] In *National Treasury Employees Union v. Von Raab*,[130] the Court allowed suspicionless drug testing of employees of the U.S. Customs Service without any particularized evidence of a drug problem, based simply on the strength of the government's interests and the insubstantial intrusion on individuals.[131] In *Michigan Department of State Police v. Sitz*,[132] the Justices decided that police did not violate the Fourth Amendment when they stopped over a hundred drivers at a sobriety checkpoint without any individual suspicion about any one of them.[133] And in two cases—one in 1995,[134] the other in 2002[135]—the Court has allowed suspicionless drug testing of public school students as a condition for participation in extracurricular activities, even activities that involve no loss of privacy (such as communal undressing for athletics) or risk of injury inherent in the activity (e.g., playing football) that drug use might exacerbate.[136]

Thus, anyone arguing that individualized suspicion sits at the center of the Fourth Amendment must confront these cases. Have the Justices simply decided to go another direction? If so, are they correct? The above review of the historical roots of the Fourth Amendment makes clear that these "special needs beyond ordinary law enforcement" cases cannot claim to rest on the foundations of our constitutional law of search and seizure.

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[128] 489 U.S. 602 (1989).
[129] *Skinner*, 489 U.S. at 619-23.
[130] 489 U.S. 656 (1989).
[131] *Von Raab*, 489 U.S. at 665-67.
[132] 496 U.S. 444 (1990).
[133] *Sitz*, 496 U.S. at 455.
[134] Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
[135] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).
[136] *Earls*, 536 U.S. at 831-32, 836-37.

Rather, they are profoundly ahistorical; the Court can only justify them by ignoring what the Fourth Amendment was clearly meant to do, and ruling in the name of policy goals that the current Court prefers. They are, in short, a perfect example of a Supreme Court reshaping constitutional guarantees to fit its idea of what is desirable. Thus, one perfectly plausible, though aggressive, position is that the drug testing and other cases that ignore the requirement of individualized suspicion is simply that these cases are wrong—inconsistent with the Amendment's history and central purpose—and should be reversed.

At the very least, one can say that the "special needs cases" are an exception to what is still now, and always has been, the rule in Fourth Amendment jurisprudence. The Court has always told us that this exception to the requirement of individualized suspicion is exactly that: an exception. It is, by its terms, used for noncriminal purposes only. Police agencies may not use it for run-of-the-mill criminal law enforcement. While some have found this justification a bit thin, it is what the Supreme Court has said in each and every one of these cases. And with two recent decisions, the Court has reinforced this distinction. In *City of Indianapolis v. Edmond*,[137] local police attempted to take the *Sitz* sobriety checkpoint case to the next logical scenario: a checkpoint for detecting drug-possessing drivers. The police argued that the checkpoint was simply meeting the "special need" of the damage caused by drug use.[138] Not so, the Court said; this was simply a checkpoint constructed to enforce the criminal law against drugs.[139] And in *Ferguson v. City of Charleston*,[140] the Court drew a similar line against a program that tested mothers for drug use. The state attempted to justify its actions under a "special need" to safeguard the health of newborns,[141] but the Court observed that the details of the program showed that it was actually

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[137] 531 U.S. 32 (2000).
[138] *Edmond*, 531 U.S. at 40-41.
[139] *Id.* at 41-42.
[140] 532 U.S. 67 (2001).
[141] *Ferguson*, 532 U.S. at 81.

directed toward arresting and prosecuting the mothers.[142] Thus, the Justices said, this was not a program designed to meet a special need at all; rather, it constituted enforcement of the criminal law, pure and simple.[143] And if police want to do criminal investigation and enforcement, the Court said, actions that impact Fourth Amendment rights of citizens must be based on individualized suspicion.[144]

3. The Importance of Individualized Suspicion to the Proper Use of Race or Ethnic Appearance in the Assessment of Reasonableness

Once we understand the importance of individualized suspicion to a clear and accurate interpretation of the Fourth Amendment, the proper way that law enforcement should make use of race or ethnic appearance in assessing Fourth Amendment intrusions comes into focus. Race and ethnic appearance have a legitimate place in police work. These physical characteristics can help police by describing individuals, and their use in this respect is and always has been constitutionally permissible. But when race and ethnic appearance begin to play a role not as concrete indicators of individual suspicion but instead as tools for statistical prediction, we move away from what squares with the Fourth Amendment's history and purpose. In short, the law should reflect an important difference between the two ways that police have used race and ethnicity: as a description and as a predictor.

The use of race or ethnic appearance as a way of describing a known suspect is both an efficacious and a constitutional way to do police work. When the police have a description of a known suspect that includes race—for example, that the perpetrator of a crime that has just occurred is five feet ten inches tall, weighs about 190 pounds, has short black curly hair and a bushy mustache, is wearing blue jeans and a tee shirt with a particular logo on it, and is black—there is absolutely no reason to omit the race of the suspect from the bulletin that the

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[142] *Id.* at 82-83.
[143] *Id.* at 82-86.
[144] *Id.* at 79-80 n.15.

police department puts out to its officers. In fact, race is one of the most important physical characteristics of a criminal that one could include in this description. It is something a witness can easily see and remember, like clothing, hair style, or facial hair. But, even better than all of those, it is immutable. A mustache, beard or head can be shaved, hair can be colored or trimmed, and clothing can be changed with ease. Not so with race. Such an unchangeable, highly visible trait has real value in accurately describing the suspect. Therefore, using race or ethnic appearance this way, to assess the reasonableness of a search or seizure, dovetails with both the history and purposes of the Fourth Amendment and is useful to the work of the police. When a person observed by police shares the racial or ethnic characteristics of a known suspect, the presence of that characteristic (along with any others, of course) serves to make it more likely that the person under observation is, in fact, the suspect. Race or ethnic appearance is both important and proper to use in such a situation. It focuses police work and any Fourth Amendment intrusions that occur as part of an investigation through the proper lens: individual suspicion. When the person police seek is black, a person under observation who is black matches the description in an important way. While that fact alone could never be enough to give police a quantum of suspicion sufficient to *meet* any legal standard, including reasonable suspicion, it can legitimately be one of the things that *contributes to* individual suspicion.

It is when we begin to use race or ethnic appearance not to describe a known suspect, but to predict the probability that any random stranger may be involved in an as-yet-unknown crime, that we stray from the Fourth Amendment's history and purpose and the protections it is supposed to afford. This, of course, is the essence of racial profiling: race or ethnic appearance is used as a proxy characteristic to indicate a greater propensity to be involved in crime. Police officers cannot look at any particular person and see that he or she is a drug courier or dealer, especially as that person drives down a roadway. But anyone can see the person's skin color or ethnic features. If we believe that persons in a particular racial or ethnic group are more likely to be drug dealers or bank robbers or terrorists,

and we see a person who belongs to that group, a law enforcement officer who uses racial profiling will use the person's racial or ethnic characteristics to make a prediction. Since people in this racial or ethnic group are more likely to be (fill in the blank: drug dealers, bank robbers or terrorists), the person I am observing is more likely to be one, too. I can therefore predict that it is more likely that I will find a (fill in the blank) if I stop this person than if I stop a person not belonging to this group. Based on this prediction and other facts I observe, I'll make the stop of this driver. This kind of prediction is based not on an individual's sharing a characteristic of a known suspect who has perpetrated a particular crime, but on sharing the characteristics of a large group of people, only a small percentage of whom may have committed any known kind of crime at any point in the past, and none of whom has committed any known crime in conjunction with the particular person under observation. This sharing of characteristics says very little, if anything at all, about the person under observation, except that he belongs to some particular large racial or ethnic group; it lends nothing to individual suspicion. In short, in terms of the particular and specific indicators of individual suspicion that the Fourth Amendment requires the government to have before a search or seizure is allowed, race or ethnic appearance adds nothing. Regardless of what the *Martinez-Fuerte* case says to the contrary, this predictive use of racial or ethnic characteristics should not be allowed under the Fourth Amendment.

B. The Moral Dimension: Group Guilt

Beyond legal considerations, one must consider the moral aspect of this use of race. Using race as a predictor is akin to assigning guilt by association: it is, in every way, morally indefensible.

Anglo-American criminal law, and most other mature legal systems, strongly align themselves with a fundamental idea: the assignment of criminal blameworthiness depends upon individual responsibility for individual actions. It is fundamental in our system that a person cannot be held responsible for a crime unless the crime was the doing of that particular individ-

ual.[145] While we permit punishment for subsidiary roles in crimes—the accomplice who encourages the person pulling the trigger, or the driver of the getaway car for the bank robbery—these actors have themselves still done *something* to deserve punishment, even if it is only to support or encourage the main actor.[146] By the same token, we require not just action for criminal liability—the proverbial *actus reus* so familiar to students of criminal law—but that the action be voluntary.[147] That is, it cannot be the result of an unconscious action or a spasm, such as the movement of a limb during a seizure. Scholars of criminal law explain that, without a voluntary, willed action, we would feel deep discomfort affixing moral blameworthiness to the individual. It is only when individuals act consciously that they deserve blame and criminal sanctions.[148] For it is only then that we deem them individually responsible for the consequences of their acts. In sum, we feel that it is morally wrong to pin blame on a person who, ultimately, is not responsible for it.

Perhaps just as important, the American legal tradition should make us deeply suspicious of anything that smacks of guilt by association with, or membership in, an unpopular group—what we might call group guilt. Group guilt can be both immensely powerful and deeply troubling when used to punish people or focus suspicion on them merely for their associations: for example, membership in the Communist Party during the

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[145] *E.g.*, MODEL PENAL CODE § 2.01(1) (1962) ("A person is not guilty of an offense unless his liability is based on conduct . . . .").

[146] *Id.* § 2.06(3)(a)(ii) ("A person is an accomplice of another person in the commission of an offense if: with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it.").

[147] *Id.* § 2.01(1) (stating that criminal liability requires "conduct that includes a voluntary act"); Martin v. State, 17 So. 2d 427, 427 (1944) (holding that intoxicated man dragged from home into street by police and arrested for "being drunk on a public highway" was not guilty because he did not appear in street voluntarily, and even though statute did not require voluntariness by its terms, "a voluntary appearance is presupposed").

[148] *E.g.*, Michael S. Moore, *Responsibility and the Unconscious*, 53 CAL. L. REV. 1563, 1567 (1980) ("One is responsible only for those consequences that are caused by his actions, and not for those things in which his body, but not his acting self, is causally implicated.").

late 1940s and 1950s. A certain number of people were members of the Party then, and more had been members in the past. Regardless of their individual beliefs or deeds, either in the 1950s or in the past, all were despised, some were hunted down, some even went to jail. Mere membership in the party, past or present, carried grave consequences for one's life and career. The abuses of the period based on group membership are well documented, but this kind of group guilt was not confined to 1950s McCarthyism. For example, in the 1988 presidential election campaign, Vice President and candidate George Bush made a regular practice of attacking his opponent, Michael Dukakis, as "a card-carrying member of the ACLU."[149] Bush got double mileage out of this: first, by virtue of the resemblance of his phrase to the 1950s tag of shame as "a card carrying member of the Communist Party," and more importantly from the blatant attempt to smear Dukakis with the negative image of a group that, while integral to the preservation of the Bill of Rights in the twentieth century, has never been universally popular with mainstream America.

But smearing, ruining or even jailing people is not the worst kind of problem associated with group guilt. Membership in the Communist Party may be unpopular, ridiculous or even stupid. It may make one a pariah, and may cause others to feel that the member is a low-functioning, lunatic loser. It is also something else, at least in this country: optional. All members of the Communist Party joined voluntarily; no one compelled them to do so, and there was never anything to prevent them from leaving the party, as many of them did. Michael Dukakis was free to join, or to quit, the ACLU; he might, at any particular time, subscribe to the organization's beliefs and principles, or he might decide that they were not for him. His association with the group was his choice, a choice that, generally speaking, he or anyone else would be free to reverse at any point.[150] Group guilt based on racial or ethnic characteristics

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[149] Jack Nelson, *Campaign Seen as Becoming Highly Negative*, L.A. TIMES, Aug. 11, 1988, at 1.

[150] The troubling exception, of course, is when people are targeted and tarred in the present for associations in the past that they have disavowed, whether recently or long ago. This was the case in the McCarthy era, as the prototypical

is different and, for that reason, profoundly more troubling. One does not choose to have these characteristics; they are, of course, accidents of birth, not organizations one may join or philosophies or sets of beliefs to which one may choose to subscribe. And of course, there is no opting out. Thus, to treat a person as a criminal, or even a suspected criminal, not because he resembles a particular suspect but because he shares characteristics of a large group of people, some very small number of whom may be engaged in some as-yet-undiscovered crimes, literally criminalizes the suspect's particular race or ethnicity. Among extreme examples, one would certainly think of Hitler's Germany, in which being Jewish became, if not literally a criminal offense, then a condition that carried significant social disabilities, stigma and even a basis for deportation and extermination. There is also the example of the massacres of Tutsis in Rwanda in the early 1990s, in which Hutus, egged on and encouraged by their leaders, hacked to death hundreds of thousands of members of the Tutsi tribe. The United States has had its own example of this thinking: the internment of persons of Japanese ancestry on the West Coast during the Second World War. The Japanese internment cannot match either Hitler's Germany or 1900s Rwanda for sheer barbarity and raw cruelty; there is no record anywhere of killing during the internment. Nevertheless, there were significant losses and hardship—lives disrupted, property sold off at fire sale prices, lifetimes of work in stable communities wiped out.[151] More importantly, all of these actions operated on the same principle: group guilt. When we decided that all 120,000 persons with Japanese features on the West Coast of the United States—citizens or noncitizens,

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question from the House Un-American Activities Committee starkly shows: "Are you now, *or have you ever been*, a member of the Communist Party?"

[151] For excellent and comprehensive looks at the internment of Japanese Americans, see, for example, LAWSON FUSAO INADA, ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERNMENT EXPERIENCE (2000), GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2001), ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE INTERNMENT (2001), and Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52 (2002).

men or women, old or young—presented a hazard because of their membership in one ethnic group, we used group membership, not individual behavior, to assign significant burdens. Clearly, it is not the same as mass murder by the state because of membership in an ethnic group, but the difference is again one of degree, not kind. It is no wonder that the nation now views the internment of the Japanese as a colossal black mark on our history—a moment in which we failed utterly to live up to our creed, and for which we have apologized to those affected.[152]

Using race or ethnicity in racial profiling as proxy predictors for a greater propensity to commit crime is no different. Though the burden imposed is not nearly so great as that borne by the interned Japanese, let alone the Jews of Hitler's Germany or the Tutsis of Rwanda, the difference is again one of degree. In racial profiling, there are burdens borne by those who feel the sting of the practice: numerous, often unpleasant dealings with the police; treatment as a criminal suspect, despite all of one's education and professional and community standing; the public stigmatization and humiliation of public stops, frisks and vehicle searches; and, perhaps most importantly, the repeated experience of powerlessness at the hands of government authority.[153] These are not insignificant burdens. When they are imposed on the basis of race, and when it becomes so common within these particular groups that it is almost impossible to meet group members who have not had these experiences, the cumulative costs become tangible and the broad taint of suspected criminality settles over every member of the group.

The scientist and social theorist Steven Pinker of the Massachusetts Institute of Technology has put the moral problem of using statistically-based racial profiling into sharp relief. In his book, *How the Mind Works*,[154] Pinker examines how human beings seem hard-wired to think in categories—what

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[152] Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 U.S.C. app. §§ 1989, 1989(a) (2000).

[153] For the full flavor of these costs, see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 1-10, 91-128 (2002).

[154] STEVEN PINKER, HOW THE MIND WORKS (1997).

we call stereotypes—when assessing other people.[155] Pinker says that racial stereotypes about criminality may have a correct statistical basis—that is, that particular racial or ethnic groups may be involved in crime at disproportionate rates.[156] Even if this is so, Pinker says, we still should not engage in a practice like racial profiling because it violates our shared moral rules. It is, he says, a repugnant practice

> not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an *individual* using the statistics of a racial or ethnic *group*. The argument against bigotry, then . . . comes from a rule system, in this case a rule of ethics, that tells us when to turn our statistical categorizers off.[157]

Racial profiling stigmatizes and penalizes, whether intentionally or not, on the basis of membership in a group. One can hardly imagine any government conduct in the modern United States more odious—or more morally suspect.

C. Practical Considerations: Using Race or Ethnic Appearance as an Indicator of Suspicion Hinders Police Work

A third set of considerations that also militates against the use of racial or ethnic characteristics for purposes of assessing the reasonableness of Fourth Amendment intrusions has little to do with the U.S. Constitution or morality, and everything to do with the practicalities and efficacy of everyday police work. When police use race or ethnic appearance as one factor among others in assessing who is suspicious enough to warrant being stopped, questioned or searched, the success of police work—the rate at which officers catch bad guys and find illegal guns and drugs—actually drops. That is, police officers are less

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[155] *Id.* at 312-13.

[156] *Id.* at 313. Note, however, that this does not mean that basing law enforcement decisions on those stereotypes makes it easier to catch criminals; in fact, the opposite is true. HARRIS, *supra* note 153, at 71-90 (noting that statistics indicate that using race or ethnicity as one factor indicating criminal suspicion results in less successful police work).

[157] PINKER, *supra* note 154, at 313.

successful in fighting crime when they use race and ethnicity as indicators of suspicion than when they do not. Put another way, using race or ethnicity this way is like tying lead weights around a police officer's ankles when he or she chases a bad guy.

For years, some observers have argued that domestic law enforcement efforts against drugs and crime must take race and ethnicity into consideration on a statistical basis. African Americans and Latinos are disproportionately involved in drug crime, proponents of profiling have said; therefore, we should concentrate anti-drug police work on them.[158] Many state and local police agencies, led by the federal Drug Enforcement Administration, did exactly that from the late 1980s on.[159] We now know that police departments in many jurisdictions used racial profiling, especially in efforts to get drugs and guns off the highways and out of the cities. For example, state police in Maryland used a profile on Interstate 95 during the 1990s in an effort to apprehend drug couriers.[160] Only seventeen percent of the drivers on the highway were African American, but according to statistics collected by the State Police themselves, *over seventy percent* of those stopped and searched were black.[161] Statistics from New Jersey, New York and other jurisdictions showed similar patterns: the only factor that predicted whom police stopped and searched was race or ethnicity.[162] No other factor—not driving behavior, not the crime rate of an area or neighborhood and not reported crimes that involved persons of particular racial or ethnic

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[158] *E.g.*, Marshall Frank, *Racial Profiling: Better Safe Than Sorry*, MIAMI HERALD, Oct. 19, 1999, at 7B (arguing that racially disproportionate imprisonment of blacks justifies using race as factor to indicate suspicion).

[159] *E.g.*, David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1; David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1; Gary Webb, *DWB*, ESQUIRE, Apr. 1, 1999, at 118; Task Force on Government Oversight, Report on Operation Pipeline (1999), http://www.aclunc.org/discrimination/webb-report.html.

[160] Criminal Intelligence Report, No. X-18-00592, Maryland State Police (Apr. 27, 1992).

[161] Expert Report of Dr. John Lamberth at 8, Wilkins v. Md. State Police, No. MJG-93-468 (D. Md. 1996), *available at* http://www.mdd.uscourts.gov.

[162] HARRIS, *supra* note 153, at 53-60, 62-72, 78-84.

groups—explained the outcomes that showed great racial or ethnic disproportionalities among those stopped and searched.[163]

As one examines these statistics, what really stands out is how ineffective this profile-based law enforcement has been. If proponents of profiling were right—that police should concentrate on minorities because criminals come disproportionately from minority groups—focusing on "those people" should yield better returns on the investment of law enforcement resources in crime fighting than nonracialized policing does. In other words, using profiles that include race and ethnic appearance should succeed *more often* than enforcement based on other, less sophisticated techniques. In any event, it certainly should not succeed *less often* than traditional policing. But in fact, in police departments that focused on African Americans, Latinos and other minorities, the "hit rates"—the rates of searches that succeeded in finding contraband like drugs or guns—were actually *lower* for minorities than were the hit rates for whites who, of course, were not apprehended by using a racial or ethnic profile.[164] This seems so counterintuitive to many proponents of profiling that they find it hard to accept, but it is true: when race or ethnic appearance became a factor in assessing suspicion—not the only factor but one factor among many—police officers did not get the higher returns on their enforcement efforts that they were expecting. Instead, they did not do as well; their use of nonracial cues (i.e., observation of suspicious behavior) against whites did a better job than racial profiling, and did not sweep such a high number of innocent people into law enforcement's net.

A few examples will illustrate the point. In New Jersey in 2000, in the area of the state that had generated the original complaints about racial profiling in the early 1990s, blacks and Latinos still made up 78% of all of the drivers that New Jersey State Police officers stopped and searched, despite the fact that the driving population was less than 20% minority.[165] In oth-

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[163] *Id.*

[164] *Id.* at 79-90.

[165] *In re: Senate Judiciary Committee Investigation Hearings: Hearing Before*

er words, in 2000—*after* New Jersey officials had admitted to using racial profiling,[166] and *after* a federal court decree had been put in place to reform the department[167]—State Police officers continued to focus disproportionately on minorities, apparently still believing that this constituted rational law enforcement. Nevertheless, the hit rate for the stops and searches of drivers in these very searches shows that the "it just makes sense" assumption remained dead wrong. The hit rates for these stops and seizures showed that State Police officers who made them found contraband or warrants on white drivers they stopped and searched at a rate of 25%; for black drivers, the hit rate was only about half that large—13%; for Latinos, it was just 5%.[168] In other words, the police were stopping a disproportionately large share of minorities compared to their presence on the road, yet their rate of success was much lower. When they used only behavioral cues in stopping whites, they did almost *twice as well* as when they stopped blacks and *five times as well* as when they stopped Latinos. In North Carolina, a study by Professor Matthew Zingraff and colleagues showed that black drivers were 68% more likely than white drivers to experience searches at the hands of the state's Highway Patrol.[169] But if Patrol officers thought this would help them catch more bad guys, they found out differently. For whites, the hit rate was 33%; for blacks, it was just 26%.[170]

In New York City, where researchers studied the NYPD's use of "stops and frisks" over a fifteen month period,[171] they

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the Senate Judiciary Comm., 209th Leg., Reg. Sess. (N.J. Apr. 3, 2001) [hereinafter *Hearing*].

[166] Peter Verniero & Paul Zoubek, State Police Review Team, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4 (1999) ("[T]he problem is real—not imagined.").

[167] Consent Decree, United States v. New Jersey, No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm.

[168] *Hearing*, *supra* note 165.

[169] Matthew T. Zingraff et al., Evaluating North Carolina State Highway Patrol Data: Citations, Warnings, and Searches in 1998, at 24 tbl.ll (2000), *available at* http://www.nccrimecontrol.org/shp/ncshpreport.htm.

[170] *Id.* at 21 tbl.14.

[171] Press Release, Elliot Spiter, Attorney General of New York, The New York City Police Department's "Stop and Frisk" Practices: A Report to the State of New York 88 (Dec. 1, 1999).

found the same familiar pattern. Blacks and Latinos were disproportionately likely to find themselves stopped and frisked relative to their presence in the city.[172] The comprehensive statistics the study used, gathered by the police department itself, demonstrated that the race of the person frisked was the driving factor behind which people were frisked; no other factor— not the crime rates of the neighborhoods where the stops took place, not the racial or ethnic makeup of the more crime-ridden neighborhoods and not the description given to police by crime victims—explained the difference.[173] More importantly, hit rates showed that, as in North Carolina and New Jersey, the focus on minorities did not help police. The hit rate for whites stopped and frisked by NYPD was 12.6 %; for blacks it was lower, 10.5%; for Latinos it was also lower, at 11.5%.[174] Given the enormous sample size—almost 175,000 stop and frisk incidents—these are statistically significant differences. Even more importantly, they show that, contrary to what profiling's proponents would expect, focusing heavily on minorities yields lower, not higher, rates of return.

D. What About Now? Profiling in the Post 9/11 Era

The low rate of return on stops using racial profiling ought to give pause to those who see ethnic profiling of Arabs and Muslims as the only sensible response to the current threat of al Queda terrorism.[175] Using race, ethnic appearance or religion as a way to decide who to regard as a potential terrorist will almost surely produce the same kinds of results: no effect

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[172] *Id.* at 94-95.

[173] *Id.* at 121-22.

[174] *Id.* at 111 tbl.I.B.1.

[175] Crouch, *supra* note 20 ("So if pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation."); Goldberg, *supra* note 20 (profiling Middle Eastern men is sensible because "not all Middle Easterners are terrorists, but in this context all terrorists are from the Middle East"); Parker, *supra* note 20 ("When an airport security guard searches a male of Middle Eastern extraction, that's common sense. A terrorist attack of such enormous proportions, followed by a declaration of war, makes racial profiling a temporary necessity that no patriotic American should protest.").

on terrorist activity, treatment of many innocent people as suspects and damage to our enforcement and prevention efforts.

First, subjecting all Middle Easterners to intrusive questioning, stops or searches will have a perverse and unexpected effect: it will spread our enforcement and detection efforts over a huge pool of people whom we would not otherwise think worthy of any police attention. The vast majority of people who look like Mohammed Atta and the other suicide hijackers of September 11, 2001, will have nothing to do with any kind of terrorism or with ethnic or religious extremism. Yet a profile that includes race, ethnicity or religion may well include them, drawing them into the universe of people that law enforcement will stop, question and search. Almost all of them will be people who would not otherwise have attracted police attention, because no other aspect of their behavior would have drawn scrutiny. Profiling will thus drain enforcement efforts and resources away from more worthy investigative efforts and tactics that focus on the close observation of behavior, like the buying of expensive one-way tickets with cash just a short time before takeoff, as some of the September 11 hijackers did.

This has several important implications. First, just as happened with African Americans and Latinos in the War on Drugs, profiling of Arabs and Muslims will be overinclusive; it will put many more people under police suspicion of terrorist activity than would otherwise be warranted. Almost all of these people will be hard-working, tax paying, law-abiding individuals. While they might understand a few ethnicity-based government intrusions as a mere inconvenience, repetition of these experiences for large numbers of people within the same ethnic groups will lead to resentment, alienation and anger at the authorities. At a time when we need the cooperation of every citizen in the difficult struggle in which we find ourselves engaged, we can ill afford this.

Second, and perhaps more importantly, focusing on race and ethnicity keeps police attention on a set of surface details that tell us very little, and it draws officers' attention away from what is much more important and concrete: behavior. One of the most important tools law enforcement agents have in preventing crime and catching criminals is observation of be-

havior. Experienced police officers know that what is important in understanding which particular person in any large group of people one observes might be engaged in illegal activity is not what that person looks like, but what he or she does. Investigating people who "look suspicious" will often lead officers down the wrong path; the key to success is to look for and carefully observe suspicious behavior. Anyone who simply looks different may seem strange or suspicious to the untrained eye, but the veteran law enforcement officer knows that suspicious behavior is what really should attract attention and investigation. Thus, focusing on those who "look suspicious" will necessarily take police attention away from those who act suspicious. Even in the current climate, in which we want to do everything possible to prevent another attack like those on the World Trade Center and the Pentagon, law enforcement resources are not infinite. We must make decisions on how we run our investigation and prevention efforts that move us away from doing just anything, and toward doing what is most effective.

Third, if observation of suspicious behavior is one of law enforcement's most important tools, then another is surely the gathering, use and analysis of intelligence. Using profiles that single out Arabs, Muslims and other Middle Easterners will damage our capacity to gather and use intelligence. Understood properly, there is nothing exotic about the idea of intelligence; it simply means information that can be useful to fight wrongdoing. If we are concerned about terrorists of Middle Eastern origin on our own soil, among the most fertile and important places from which to gather intelligence will be Arab-American and Muslim communities. If we adopt a security policy that stigmatizes every member of these groups in airports and other public places with intrusive stops, questioning and searches, we will alienate the members of these communities from law enforcement at precisely the time their help is needed the most. And the larger the population we subject to this treatment, the greater the total amount of damage we inflict on law-abiding persons. The best lesson one could imagine in how important this idea is comes from the town of Lackawanna, New York, a small municipality outside of Buffalo. Seven Yemeni men were

arrested in Lackawanna in September of 2002.[176] The government alleged that all of them were part of an al Queda "sleeper" cell, with the aim of inflicting massive damage on the United States.[177] These arrests did not result from intelligence gathered during CIA investigations in the Middle East, from super-secret high tech communications intercepts by the National Security Agency, from military field interrogations in Afghanistan or from the questioning of 5000 Arab "nonsuspects" by the U.S. Department of Justice. Rather, the information that led the FBI to the men came directly from Lackawanna's Yemeni community.[178] They knew the men, and they knew there were people living among them who might be loyal to al Quaeda.[179] Law enforcement would have known none of this on its own and would never have learned it if not for the willingness of some community members to communicate the information to the FBI. Had these people become fearful or alienated because of the treatment they themselves had suffered at the hands of the government, it could easily have resulted in members of the community becoming fearful enough to hesitate to speak up and give the government this information.[180]

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[176] John Kifner & Marc Santora, *Judge Denies Bail for 5, Citing Community Safety*, N.Y. TIMES, Oct. 9, 2002, at A16 (relating account of six men arrested on terrorism charges).

[177] *Id.* Federal prosecutors alleged men were "members of a terrorist cell awaiting orders to strike." *Id.*

[178] Philip Shenon, *Threats and Responses: Indictment; U.S. Says Suspects Awaited an Order for Terror Strike*, N.Y. TIMES, Sept. 15, 2002, at 1 ("[F]ederal law-enforcement officials said that they opened their investigation . . . after receiving information from within the area's Muslim community months ago that people loyal to al Quada might be living among them.").

[179] *Id.*

[180] Whether or not the residents of Lackawanna would have become fearful enough to be uncooperative and fail to inform law enforcement, or more generally whether the use of "Arab profiling" will make Arab and Muslim communities so fearful that they will not come forward, is obviously an empirical question. If this fear could be quantified, perhaps law enforcement authorities would simply decide that what they believe they gain from profiling is worth more than they might lose in the course of alienating these communities. And perhaps that judgment will ultimately be theirs to make, but the point here is that, at the very least, law enforcement should not decide that profiling is a good idea—a net benefit—without at least considering the possible costs it would carry as well as any

A fourth consideration is that racial and ethnic profiling of Arabs, Middle Easterners and Muslims assumes that we need to worry about only one type of terrorist. We must not forget that, prior to the attacks on September 11, 2001, the most deadly terrorist attack on American soil was carried out not by Middle Easterners with Arabic names and accents, but by two very average American white men: Timothy McVeigh, a U.S. Army veteran from upstate New York, and Terry Nichols, a farmer from Michigan. Fortunately, we were smart enough in the wake of McVeigh's and Nichols's crime not to call for a profile emphasizing the fact that the perpetrators were white males. The unhappy truth is that we just don't know what the next group of terrorists might look like. And since al Quaeda has trained thousands of potential terrorists of all kinds from all over the world, using a racial or ethnic profile will pose no real obstacle to this deadly network.

IV. A DIFFICULT CASE: *BROWN V. CITY OF ONEONTA*

How does the "description versus prediction" rule work in a real case, especially a very difficult one involving policing and race? *Brown v. City of Oneonta*,[181] a case from the Northern District of New York that has produced no fewer than three published opinions from the U.S. Court of Appeals for the Second Circuit, gives us the opportunity to explore this question.

The *Oneonta* case began with an unfortunate garden-variety crime. On September 4, 1992, someone broke into a house on the outskirts of the town of Oneonta.[182] The intruder, armed with a knife, assaulted a seventy-seven-year-old woman.[183] When police responded, the woman told them that she could not identify her attacker's face, since she had been attacked from behind.[184] Based on her view of the attacker's hand and arm, the woman told police that her assailant was a black man, and also said that she thought he was young, based

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potential benefits.

[181] 221 F.3d 329 (2000).

[182] *Oneonta*, 221 F.3d at 334.

[183] *Id.*

[184] *Id.*

on the speed with which he crossed the room.[185] She also said that the attacker had been cut on the hand with the knife as she struggled with him.[186] A police canine unit tracked the scent of the attacker for several hundred yards in the direction of the campus of the State University of New York College at Oneonta (SUCO), but eventually lost the trail.[187]

Oneonta, located in upstate New York, has approximately 10,000 residents, all but 300 of whom are white.[188] In addition, SUCO has some 7500 students; about two percent—roughly 150—are black.[189] These demographic facts are critical to any understanding of what the police did to investigate the crime. Police officials immediately contacted SUCO; they asked for and received a list of all of SUCO's black male students.[190] The police then attempted to locate and question every person on the list.[191] This effort uncovered no suspects.[192] During the next few days, the police conducted a "sweep" through the town, stopping and questioning non-whites on the streets of Oneonta and looking for cuts on their hands.[193]

According to the allegations of the plaintiffs, these encounters were often more than simple, polite requests to see their hands. One of the plaintiffs said that a police officer pointed a squad car's spotlight at him. The officer then said, "What are you, stupid? Come here. I want to talk to you."[194] The officer then told the man to show his hands.[195] Another plaintiff, who was driving, was pulled over by a squad car with its lights flashing and siren activated.[196] He was ordered out of the ve-

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185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.* at 340.
195 *Id.*
196 *Id.*

hicle and made to put his hands on its roof.[197] A third plaintiff was stopped on the street by a number of officers who formed a circle around him.[198] The officers asked where he had been and if he was a student, and then asked him to show identification.[199] After all of this, the plaintiff asked for and received permission to leave, but as soon as he did so he was immediately ordered back and told to show his hands.[200] A fourth plaintiff, a female who was waiting for a bus, was approached by an officer who told her that if she wanted to board her bus, she would have to provide identification.[201] This stop seems particularly odd, given that the suspect was a man. It makes one wonder whether all characteristics of the suspect—even gender—were discarded except for race. No suspect was ever found, as a result of the sweep or otherwise.

The plaintiffs (those discussed in the preceding paragraph and others) filed suit against the police under the U.S. Constitution and federal law, alleging violations of their right to equal protection under the Fourteenth Amendment and their right to be free from unreasonable searches and seizures under the Fourth Amendment.[202] The district court denied or dismissed virtually all of the plaintiffs' claims, and the case was appealed to the Second Circuit Court of Appeals.[203] That court affirmed the district court's denial of the plaintiffs' equal protection claims, but reversed and remanded certain aspects of the Fourth Amendment claims.[204] That opinion was modified as to the Fourth Amendment claims, leaving at least four of those claims to be litigated in the district court.[205] A petition for a rehearing en banc was denied, but—in what is surely a very unusual occurrence—multiple opinions were filed on the

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[197] *Id.*
[198] *Id.* at 341.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 334-35.
[203] *Id.* at 334-36.
[204] Brown v. City of Oneonta, 195 F.3d 111, 123 (2d Cir. 1999), *amended and superseded by* 221 F.3d 329 (2d Cir. 2000).
[205] *Oneonta*, 221 F.3d at 336.

denial of rehearing en banc, with three opinions concurring in the denial and three opinions dissenting from it.[206]

Most of the three Second Circuit opinions center on the equal protection issue in the case. Simply put, in what circumstances does a police investigation that utilizes race constitute a violation of the right to equal protection of the laws? If the question is simple, the answer is surely not. All of the opinions do their best to deal with difficult and troubling questions of equal protection, on both the legal and policy levels. That these questions are complex is due in no small part to the difficulty that any plaintiff has in proving an equal protection case under current Supreme Court precedent, even in cases with the strongest possible facts.

But the equal protection issues are not the most important for this discussion. For our purposes, let us focus on the Fourth Amendment questions the case presents. The district court dismissed the plaintiffs' Fourth Amendment claims because even those plaintiffs who had made factual allegations in affidavits had not, according to the district court, alleged any Fourth Amendment intrusion.[207] That is, the district court concluded that, under *Terry v. Ohio*, the plaintiffs' allegations did not show that the plaintiffs had actually been stopped.[208] Rather, their encounters with police did not rise to the level of even temporary detentions under the Fourth Amendment.[209] The Second Circuit reversed this finding. The court stated that, at least as to the four plaintiffs discussed above, their encounters with the police were in fact detentions, triggering Fourth Amendment protections.[210] Whether the detentions violated the Fourth Amendment—that is, whether police had the requisite factual support under *Terry* to make these detentions—the Second Circuit left for the district court to resolve.[211] It vacated summary judgments that the district court had entered against all four of the plaintiffs, and remanded the cases to the

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[206] Brown v. City of Oneonta, 235 F.3d 769, 770 (2d Cir. 2000).
[207] *Oneonta*, 221 F.3d at 335.
[208] *Id.* at 340.
[209] *Id.*
[210] *Id.* at 340-41.
[211] *Id.*

district court for further litigation.[212]

As of this writing, the Fourth Amendment claims of the four plaintiffs remain unresolved by the district court on remand. For our purposes, let us use the facts of the case to ask this question: was the use of race by law enforcement in *Oneonta* proper under the rule proposed in this paper? If the Fourth Amendment should allow the use of race as a description but not as a predicting factor, do the police actions in the case—the stops of students and others in the town either because police found them on the list of black male students supplied by SUCO or because they encountered them in the "sweeps" of the town's streets—pass muster under the rule?

The answer is less than clear. Begin by considering the way in which the police used race. The race of the perpetrator came directly from the victim. Race was one of the only characteristics of her assailant that she actually knew. She had not seen enough of his face to make an identification, and presumably remembered nothing of his clothing. She speculated that he was young, given the speed with which he moved across the floor.[213] The only things she seemed to know about him with any certainty were his race and gender—the arm she saw belonged to a black man—and the fact that he had a cut on his hand produced during her struggle with him.[214] All of these characteristics—male, black, visible cut on hand—are valid ways of describing the assailant; they are physical characteristics that one can easily recognize and use to identify someone as either looking or not looking like a particular perpetrator of a particular crime. In that sense, these characteristics are not being used to predict who, among some large group of people, might be involved in an as-yet-unknown crime with, of course, no known suspect. That would be the type of predictive use of race the rule condemns, but it is not happening here. Rather, the police are using race as one trait among three to see who matches the description.

However, this does not mean that what happened in

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[212] *Id.*
[213] *Id.* at 334.
[214] *Id.*

Oneonta would not be problematic in an important way. But this is not because what happened violates the "description versus prediction" rule. Rather, the difficulties lie in something much more basic: would the stops of numerous individuals on so little evidence meet even the minimal *Terry* standard of reasonable suspicion? It is, of course, true that that standard is lower than probable cause. The Supreme Court has refused to set any quantitative standard for reasonable suspicion, saying only that a police officer should be able to articulate fact-based suspicion based on her observations, and draw inferences based on her training and experience. Even given such a low standard, however, it is far from clear that a person's race and gender should be enough to subject him to a Fourth Amendment seizure. If that were so, any black man could be seized on those traits alone; once enough time has passed that the perpetrator could have left Oneonta and its environs, there is absolutely no reason that this reasoning could not extend to all black men within a large geographic area. At some point, the fact that any particular male black person that police might encounter could be the assailant becomes vanishingly small. Put another way, the little evidence that police have—the fact that the attacker was a black man—loses most, if not all, of its probative value very quickly.

Of course, there is one other course that the police could take that might help them to conduct their investigation. Instead of forcibly and less than courteously stopping people—"What are you, stupid? Come here" or being surrounded by police—the police might try to enlist the cooperation of black men and the entire black community. They would have to take a decidedly different tack. They would have to explain the facts of the situation they faced to each individual they met and wished to talk to, and to the community at large, perhaps through the media. Without demanding or commanding obedience, officers would then request permission to see the hands of black men, and nothing more—no questioning as to who the men were, their whereabouts, occupations or the like, and certainly no frisks or other searches. A brief check of the hands would make all of that superfluous anyway; anyone without a cut could not, by definition, be a suspect. No other intrusion

would be even remotely necessary. The person could be thanked and sent on his way, probably in less than a minute. The encounter might go something like this:
Police Officer: Excuse me, sir. Someone's committed a crime in this area. An old woman was attacked with a knife in her home. She didn't see the guy's face, but she saw his arm and hand, so she knows the guy was black, and she saw that he got a cut on his hand when she struggled with him. That's all we have to go on, and we really want to catch this guy before he hurts someone else. Would you mind just showing me your hand?
Black Man: All she said was that he was black and had a cut on his hand?
Police Officer: That's right. That's all we have to go on.
Black man: Sure, I guess, O.K. (Shows officer his hands, which have no cuts). Is that it?
Police Officer: Yes, that's all sir. Thank you for your cooperation.
Black Man: Sure.

Would every encounter go as smoothly and quickly? Not necessarily. Might some men see some subtle racism lurking and be offended, perhaps asking themselves if police would question all the white people in an all-black area if the assailant had been white? Perhaps. Would some perhaps refuse to cooperate for this reason or for any other, such as—perish the thought—on principle, insisting on their constitutional right not to deal with the police absent some fact-based reasonable suspicion? Some probably would. Would that not impede the investigation from the police point of view? Perhaps it would. But the suggestion made here could not have been less successful than what the police actually did, since they found no suspects at all. And the method suggested above would not have brought the police something their own method did: the enmity of many members of their own community and ten years of litigation that, as of this writing, remains unresolved.

V. CONCLUSION

This symposium has encouraged us to ask an important question: what is the proper role of race or ethnicity in assessing the reasonableness of a search or seizure? If the question was important before September 11, 2001, it is only more important now, as we sit in a country in which many thoughtful people have called for using race or ethnicity, among other factors, in judging whether someone might be a potential terrorist.

The rule proposed here—description, yes; prediction, no—will not satisfy everyone. The rule would make the use of race or ethnic appearance off limits in some significant ways in criminal and anti-terrorist investigation. But even if one's view is that the history of the Fourth Amendment and its core purposes, as well as any moral qualms, simply must yield to the very real exigencies of the situation, perhaps more practical considerations will give pause. It appears that when race or ethnicity becomes part of the calculus of suspicion—not the only factors, but factors among others—law enforcement becomes less effective. And in today's world, we simply cannot afford that—even if, in the minds of some, our constitutional and moral principles are expendable.

"VOLUNTARY" INTERVIEWS AND AIRPORT SEARCHES OF MIDDLE EASTERN MEN: THE FOURTH AMENDMENT IN A TIME OF TERROR

Tracey Maclin[*]

INTRODUCTION

The tragic and horrible events of September 11, 2001 have changed the terms and direction of the debate regarding the use of race and ethnicity by law enforcement officers. Before the terrorist attacks on September 11, presidential and gubernatorial candidates were tripping over each other to condemn racial profiling by law enforcement officers.[1] Prior to Septem-

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[*] Professor of Law, Boston University School of Law. I want to thank Professor Tom Clancy for inviting me to speak at the University of Mississippi School of Law and to attend a symposium entitled, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure*. I also want to thank the National Center for Justice and the Rule of Law at the University of Mississippi School of Law that is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the United States Department of Justice, for its generous support of this article.

[1] Republican presidential candidate George W. Bush denounced racial profiling during a presidential debate, saying he could not "imagine what it would be like to be singled out because of race, and stopped and harassed. It's just flat wrong, and that's not what America is all about, and so we ought to do everything we can to end racial profiling." *The Presidential Debate*, L.A. TIMES, Oct. 10, 2000, at A14. Likewise, Democratic presidential candidate Al Gore claimed to support a ban on racial profiling "whether it's African Americans, Arab Americans, whatever." Ceci Connolly & Mike Allen, *Gore Rips Bush Claims on Budget, Hate Crimes*, WASH. POST, Oct. 15, 2000, at A10. In New Jersey, Democratic and Republican gubernatorial candidates also spoke out against racial profiling during their campaigns. *See* Jonathan Schuppe, *Gubernatorial Candidates Offer Ways To Combat Racial Profiling*, STAR-LEDGER (Newark), Aug. 3, 2001, at 23 (noting Republican Bret Schundler's plan to outlaw consent searches until the state police established court-ordered monitoring system over police practices as well as Democrat Jim McGreevey's support for a racial profiling criminal statute). For a discussion of the definitional problems of "racial profiling," see generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post September 11 World*, 40 AM. CRIM. L. REV. 1195, 1204 (2003). *See also* Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 48 (2003) ("Generally speaking, racial profiling occurs

ber 11, many Americans believed that racial profiling was unacceptable police work and prejudicial to racial minorities.[2] Even a *few* law enforcement agencies and individual police officers conceded that racial profiling had fundamental defects.[3]

After September 11, public opinion on racial and ethnic profiling changed precipitously. After learning that nineteen

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when an officer's decision of whom to stop and question for suspected criminal activity proceeds from the individual's race or ethnicity itself. In such a case, it is the individual's race or ethnicity that attracts the officer's interest or suspicion. From that point of suspicion the officer may then be motivated to engage in pretextual behavior to justify the individual's stop or arrest."). For an excellent post-September 11 discussion of racial and ethnic profiling—when it should be permissible and impermissible and a critique of the constitutional doctrine related to the topic, see generally Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163. When it comes to defining racial profiling, Professor Alschuler notes that "opponents of racial profiling often have failed to define the term, and the definitions provided by legislatures and scholars have differed substantially." *Id.* at 168 (footnote omitted).

[2] Specifically, according to a December 1999 Gallup Poll, eighty-one percent of the public disapproved of racial profiling. *See* Florangela Davila, *ACLU Ads to Spotlight "Racial Profiling" Issue*, SEATTLE TIMES, Apr. 20, 2000, at B5. Of course, not everyone disapproved of racial profiling by police officers or believed that racial profiling had become a phenomenon dangerously out of control. *See* Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1422 n.38 (2002) (citing "conservative commentators" who defended racial profiling on practical grounds); Robert H. Bork, *Civil Liberties After 9/11,* FRONT PAGE MAGAZINE, July 4, 2003 (stating that "there is by and large no evidence that police have relied excessively on ethnic or racial profiling in conducting their normal investigations"), *available at* http://www.frontpagemag.com/articles/ Printable.asp?ID=8758.

[3] *See, e.g.,* Peter Verniero & Paul H. Zoubek, Office of the Attorney Gen. of N.J., Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4 (1999) [hereinafter Interim Report] (explaining that "minority motorists have been treated differently than non-minority motorists during the course of traffic stops on the New Jersey Turnpike" and concluding that "the problem of disparate treatment is real—not imagined"); *see also* Albert W. Alschuler, *supra* note 1 (noting additional instances of government officials and judicial bodies criticizing racial profiling); James H. Burnett III, *Feingold Bill Would Ban Racial Profiling; Proposal Sent to Bush has Police Chiefs' Support*, MILWAUKEE JOURNAL-SENTINEL, June 19, 2001, at 3; Kate Grusich, *Lake County Police Develop Plan to Prevent Racial Profiling*, DAILY HERALD (Chicago), Jan. 13, 2001, at 5; Mark Mathis, *Local Police Condemn Racial Profiling*, AUGUSTA CHRONICLE, Mar. 4, 2000, at A7; David L. Teibel, *Napolitano Praised For Profiling Guidelines*, TUCSON CITIZEN, May 28, 2001, at 1C; Stephen Thompson, *Police Stand Against Racial Profiling*, TAMPA TRIBUNE, May 12, 2001, at 2.

Middle Eastern men were responsible for September 11, many Americans reconsidered their views on racial profiling.[4] Profiling blacks or Latinos on the highways is still opposed by the average citizen, but profiling young, Middle Eastern or Islamic men at airports or other high-risk security venues is now favored by many Americans.[5] Columnists Stuart Taylor and Charles Krauthammer, for example, have specifically urged the targeting of Middle Eastern airline passengers.[6] Even Floyd Abrams, the nation's most prominent First Amendment lawyer and a zealous defender of the Bill of Rights, has endorsed giving airport officials the authority to consider the ethnicity of select non-citizens during security checks.[7]

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[4] *See generally* Joyce Purnick, *Last Week Profiling Was Wrong*, N.Y. TIMES, Sept. 15, 2001, at A8; Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1; *see also* DAVID COLE, ENEMY ALIENS 48 (2003) (noting that after September 11, "polls reported that nearly 60 percent of the American public favored ethnic profiling, at least as long as it was directed at Arabs and Muslims"); Alschuler, *supra* note 1, at 163-64 (describing the post-September 11 "shift in sentiment" towards racial profiling).

[5] *But cf.* Alschuler, *supra* note 1, at 223-30 (criticizing arguments that distinguish profiling of blacks from profiling of Arabs and Muslims at airports); Ramirez, et al., *supra* note 1, at 1226-30 (offering several arguments why profiling of Arabs and Muslims at airports would be ineffective police work and counter-productive to deterring terrorism); Davis Harris, *Is this a Terrorist? (or Just a Mindset)*, BOSTON GLOBE, Feb. 10, 2002, at C2 (arguing against reliance on ethnicity when looking for terrorists).

[6] Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 18, 2002, at 104; Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, NAT'L J., Nov. 3, 2001, *available at* 2001 WL 25926324; *see also* Fedwa Malti-Douglas, *Let Them Profile Me*, N.Y. TIMES, Feb. 6, 2002, at A21.

> [i]t is a fact that the particular terrorist group sworn to our destruction, Al Qaeda, is made up largely of Middle Easterners. It is not unreasonable to direct increased attention to passengers with some connection to the Middle East.
>
> Arab-Americans like me want to be safe when we fly. Cooperating with security procedures, even when we suspect that we are getting more attention than our fellow citizens, makes sense. Does anyone really want a security official to hesitate before stopping a suspicious passenger out of fear of an accusation of bias?

Id.

[7] According to Abrams, "[i]t would be crazy not to consider what people look like when we're looking for people who may be involved with hijackings. . . . It would be bizarre." *CBS News: 60 Minutes* (CBS television broadcast, Aug. 11,

High-ranking members of the Bush Administration have also subtly changed their positions on racial profiling. Within days of the September 11 attacks, Attorney General John Ashcroft stated that people at airports would not be considered terrorist "suspects based solely on their race and ethnic origin."[8] Similarly, Federal Bureau of Investigation Director Robert Mueller said, "[w]e do not, have not, [and] will not target people based solely on their ethnicity, period. . . ."[9] The

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2002), *available at* 2002 WL 8424881. Abrams found "a big difference between being interned and being searched a little more at an airport." *Id.* Abrams also noted that the country had "been attacked, and the one thing that the attackers [had] in common . . . [was] their national origin and their sex and their language." *Id.*; *see also* Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 4-5 (2002) (explaining recommendation submitted by civil liberties advisory committee to Vice President Gore that airport security officials be permitted to consider nationality of non-citizens: "It was preposterous, I thought, to tell airport officials not even to consider the citizenship of visitors from any, say, Iran or Libya when deciding whom to search with particular intensity."); David Wallis, *Questions for Floyd Abrams*, N.Y. TIMES, Apr. 7, 2002, at 17 ("I'm afraid that I think that [privacy interests] should [yield to national security interests].").

[8] *Fox News: Fox News Sunday* (Fox television broadcast, Sept. 16, 2001), *available at* 2001 WL 7790874.

[9] Eric Lichtblau & James Gerstenzang, *After the Attack*, L.A. TIMES, Sept. 18, 2001, at A3. On June 17, 2003, the Justice Department, responding to directions from President Bush, issued guidelines barring federal law enforcement officers from using race or ethnicity in routine police operations and investigations. *Justice Department Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 17, 2003, *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. The Guidelines state:

> In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, federal law enforcement officers may *not* use race or ethnicity to any degree, except that officers may rely on race and ethnicity if a specific suspect description exists. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.

Id. at 1. The Guidelines, however provide an exemption for investigations involving terrorism and national security or "preventing catastrophic events." *Id.* at 8. In this category of cases, federal officers may consider "race, ethnicity and other relevant factors to the extent permitted by our laws and the Constitution." *Id.* at 8; *see also* Eric Lichtblau, *Bush Issues Federal Ban on Racial Profiling*, N.Y. TIMES, June 18, 2003, at A1.

Even assuming that federal law enforcement officers in the field will comply with the President's guidelines and heed the announcements of the Attorney General and FBI Director not to target individuals at airports "solely" on their ethnicity, this safeguard is unlikely to deter explicit ethnic profiling by agents in the

crucial term used by the Attorney General and the FBI Director is "solely." The Attorney General left no doubt that airport security personnel would be permitted to *consider* a person's ethnicity to determine whether to detain or search, but officials will not stop or search Arabs or Muslims based solely on ethnicity or national origin. The bottom line is that racial and ethnic profiling is no longer the evil concept it had been prior to September 11, 2001.

Although racial profiling has generated considerable public attention in recent years,[10] the law enforcement use of race and ethnicity to target individuals for search or seizure predates the Constitution.[11] In the last few decades, the Supreme Court has tolerated racial and ethnic profiling and has asserted that the Fourth Amendment does not impose constitutional restraints against profiling. In two significant cases decided in the 1970s concerning border patrol operations, the Court not only signaled that race and ethnicity are not forbidden criteria to determine the reasonableness of a search or seizure, but it also expressly authorized ethnic-based seizures at border checkpoints and locations near the border.[12] More

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field. As Professor Randall Kennedy has recognized,

> [e]ven if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor. In a close case, it is a person's race which might make the difference between being stopped by the police or being permitted to go on about one's business free from governmental intrusion.

RANDALL KENNEDY, RACE, CRIME, AND THE LAW 148-49 (1997). *See also* Alschuler, *supra* note 1, at 178 (noting case where a federal immigration supervisor "testified that, in making roving-patrol stops, his subordinates considered, in addition to Latino ethnicity, a 'dirty, unkempt appearance,' a 'lean and hungry look,' and wearing work clothes. When the government allows unkempt Anglos to proceed and detain unkempt Latinos, it employs an ethnic classification." (footnotes and citations omitted)).

[10] For a thorough critique of the usefulness of racial profiling and the harms it has caused, see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002).

[11] *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334-36 (1998); *see generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791, at 432-54 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

[12] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v.

recently, a unanimous Court in *Whren v. United States*[13] held that pretextual traffic stops of black motorists do not implicate the Fourth Amendment's guarantee against unreasonable searches and seizures.[14] *Whren* acknowledged that race-based enforcement of traffic laws might violate the Constitution; however, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[15] According to the

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Brignoni-Ponce, 422 U.S. 873 (1975). In *Martinez-Fuerte*, the Court held that the Fourth Amendment allows the detention of vehicles at fixed checkpoints away from the border even in the absence of individualized suspicion that a vehicle contains illegal aliens. *Martinez-Fuerte*, 428 U.S. at 566-67. The Court also stated that border agents could rely on the appearance of Mexican ancestry as justification for the selective referral of a motorist to a "secondary inspection" area for interrogation. *Id.* at 563. *Brignoni-Ponce* invalidated the stop of a vehicle by border patrol agents solely on the basis of the occupants' Mexican ancestry. *Brignoni-Ponce*, 422 U.S. at 886-87. While the Court ruled that Mexican ancestry, standing alone, did not provide reasonable suspicion to justify a detention, the Court stated that the occupants' Mexican appearance is a relevant, but not dispositive, factor in the reasonable suspicion equation needed for a valid stop under the Fourth Amendment. *Id.* at 887. A student commentator has suggested that the Fourth Amendment doctrine announced in *Martinez-Fuerte* and *Brignoni-Ponce* "will offer little protection against [the] use of race as a factor in the search for terrorists." Liam Braber, Comment, Korematsu*'s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 476 (2002) (stating that the Court in "*Brignoni-Ponce* and *Martinez-Fuerte* indicated that the likelihood of an individual of certain ancestry being involved in a certain crime was enough to make that ancestry an 'objective criterion' to reasonable detention"); *see also* Davies, *supra* note 1, at 62 n.68 (noting that "although it may be in [*Brignoni-Ponce* and *Martinez-Fuerte*] that Hispanic appearance is 'logically relevant,' there are good reasons to question its 'legal relevance.' That is, even if the Hispanic appearance of a car passenger near the border between the United States and Mexico makes it minimally more likely that the car contains aliens illegally in the country than it would be without that piece of evidence, in a state boasting a sizeable Mexican-American population, the probative value of that ethnic information quickly diminishes to nearly zero."); HARRIS, *supra* note 10, at 132 ("The Supreme Court's pronouncements in this area, combined with the universal stereotype of illegal immigrants as Latino, all but guarantee that police will use ethnicity in its crudest form, whether or not [police] agencies have immigration-related responsibilities."). For a provocative discussion of *Brignoni-Ponce* and *Martinez-Fuerte*, and why border patrol agents should be free to consider ethnicity when looking or illegal aliens in areas near the southern border, see Alschuler, *supra* note 1, at 236-45.

[13] 517 U.S. 806 (1996).

[14] *Whren*, 517 U.S. at 819.

[15] *Id.* at 813.

Court, subjective intentions of law enforcement officials, including those based on racial stereotypes or bias, are irrelevant to Fourth Amendment analysis.[16] Thus, if an officer has probable cause for a traffic stop, it is inconsequential if the officer's stop was motivated by racial or ethnic factors, rather than legitimate traffic safety concerns. Probable cause of a traffic violation, therefore, insulates a police stop from Fourth Amendment scrutiny.[17]

The upshot of the Court's Fourth Amendment doctrine is clear: government officials may consider race or ethnicity in deciding whether to make a seizure during border patrol operations. Defendants and civil rights plaintiffs, however, cannot rely on the Fourth Amendment for protection against race-based law enforcement practices. A critic might assert that this framework amounts to a "win-win" situation for the government. In other forums, I have criticized the Court's Fourth Amendment jurisprudence on issues pertaining to race.[18] My

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[16] *Id.*

[17] *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 297 (1998) (noting that *Whren* "cordon[s] off an entire category of 'circumstances' that might ordinarily be thought pertinent to the reasonableness of an officer's actions [regarding a traffic stop], and make[s] them irrelevant as a matter of law"). Of course, it is easy to acquire "probable cause" for a traffic stop. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997).

> In a world . . . where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing. Officers can arrest for a minor offense—everyone violates the traffic rules—in order to search or question a suspect on a major one. This allows arrests and searches of suspected drug dealers without any ex ante support for the suspicion, the very thing the probable cause standard is supposed to forbid.

Id.; *see also* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

> In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.

Id.

[18] *See, e.g.*, Tracey Maclin, *"Black and Blue Encounters" Some Preliminary*

previous views, however, were formulated prior to the horrific events of September 11, 2001. In this essay, I discuss two examples of ethnic-based policing following September 11 and articulate why these law enforcement practices are constitutionally impermissible.

First, I will discuss Attorney General John Ashcroft's memorandum ordering law enforcement officers to interview a list of five thousand young, alien men from mostly Middle Eastern countries. Part I of this essay contends that the federal government's list amounts to ethnic profiling. Furthermore, regardless of whether the government's list constitutes ethnic profiling, Part I argues that the men targeted for "interviews" most likely felt powerless to reject the government's request for a "voluntary" interview. Although the men targeted for interrogation probably felt coerced into submitting to interviews, these interrogation sessions are nonetheless considered consensual encounters under current Fourth Amendment jurisprudence.

The second example of ethnic profiling by law enforcement is not currently the law, nor a *de facto* policy acknowledged by government officials. Part II analyzes a proposal advocated by Stuart Taylor, Charles Krauthammer and others that would authorize airport security officials to select passengers for additional security checks based on national origin. Although Taylor and Krauthammer's proposal may appeal to our common sense and attempt to placate our fears of future terrorist attacks, their proposal relies on the same premise that justified the detention of Japanese Americans and Japanese aliens in federal concentration camps following the attack on Pearl Harbor. Just as some Americans in the 1940s believed that individuals of Japanese ancestry represented a threat to national security and could not be trusted to be loyal to the United States,[19] today many believe that Middle Eastern and

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Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991); Maclin, *supra* note 11; Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

[19] *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 3 (2001) ("Japanese Americans were singled out

Muslim young men represent a threat as potential terrorists and must be targeted for special scrutiny at the nation's airports.

PART I: "VOLUNTARY" INTERVIEWS

A. Was The Justice Department's "List" Ethnic Profiling?

Within weeks of the September 11 attacks, Attorney General Ashcroft ordered federal Anti-Terrorism Task Force officers and other law enforcement agents to interview approximately five thousand young aliens. The men were primarily from Middle Eastern nations, between the ages of eighteen and thirty-three years old and had arrived in the United States sometime after January 1, 2000 on temporary student, tourist or business visas. The State Department registered and officially categorized these men as lawful residents of the United States.[20]

Attorney General Ashcroft later explained the Justice Department's methodology for compiling the names of these five thousand men: "The list was generated by taking a population of individuals and applying to that population a set of

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from other 'enemy' groups such as Italian Americans and German Americans as innately untrustworthy on racial grounds.").

[20] Florangela Davila & Mike Carter, *Immigrants Urged to Exercise Rights*, SEATTLE TIMES, Nov. 21, 2001, at B1. On March 20, 2002, the Justice Department announced a second round of interrogations of three thousand alien men, ages eighteen to forty-six, who came to the United States between October 2001 and February 2002 from nations where al Qaeda was operating. *Id.* The Department conceded that the initial interview project questioned only half of the approximately five thousand men the Department targeted for interviews. *See* Philip Shenon, *Justice Dept. Wants to Query More Foreigners*, N.Y. TIMES, Mar. 21, 2002, at A19. Attorney General Ashcroft "acknowledged that the government's failure to find many of the men on the original list demonstrated 'serious flaws' in its ability to keep track of visitors to the United States." *Id.* He also noted that the initial interrogations had generated "a significant number of leads for investigators looking into the Sept. 11 attacks and other potential terrorist activities," but other Department officials conceded that the interrogations had produced no arrests involving the events of September 11 or terrorist activities. *Id.* Approximately twenty persons had been arrested for immigrations violations. *Id.*; *see also New Round of Interviews Planned with Foreigners*, WALL ST. J., Mar. 21, 2002, at 8; Jonathan Peterson, *U.S. Will Interview More Foreigners in Fight on Terrorism,* L.A. TIMES, Mar. 21, 2002, at A20.

generic parameters. . . . These individuals were selected for interviews because they fit the criteria of persons who might have knowledge of foreign-based terrorists."[21] The Attorney General dismissed criticism that the federal government was engaged in racial or ethnic profiling. "[T]here is no place for ethnic or religious stereotyping in this plan, or in this nation's campaign against terrorism. Nor were these individuals selected because they are suspected of any criminal activity, and, absent any other indication that they are criminals, they should not be treated as such."[22] The Attorney General further noted that "[t]hese individuals were not selected in order to single out a particular ethnic or religious group, or to suggest that one ethnic or religious group is more prone to terrorism than another. I emphatically reject that proposition. . . ."[23]

Following the release of the Attorney General's memorandum, FBI agents and local police officials received the following guidelines for conducting the interrogations:

> Since the persons to be interviewed are not suspected of involvement in criminal activity, the interviews will be conducted on a consensual basis, and every interview subject ("individual") will be free to decline to answer questions. In approaching the individual, you should announce your name, title and law enforcement agency, clearly explain the purpose

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[21] Memorandum from the Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) [hereinafter Attorney General's Interview Memorandum], *at* http://www.usdoj.gov/ag/readingroom/terrorism1.htm.

[22] *Id.*; *see also* Jodi Wilgoren, *A Nation Challenged: The Interviews; Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain*, N.Y. TIMES, Nov. 15, 2001, at B7. Later, the head of the Criminal Division of the Justice Department, Assistant Attorney General Michael Chertoff, told the Senate Judiciary Committee that the interviews were not ethnic profiling. Chertoff asserted, "We have emphatically rejected ethnic profiling. What we have looked to are characteristics like country of issuance of passport. . . ." *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division).

[23] Attorney General's Interview Memorandum, *supra* note 21; *see also* Naftali Bendavid, *Interview Letters Go to 500 in Michigan*, CHI. TRIB., Nov. 27, 2001, at 1.

> of the interview, and ask permission to speak with the individual. As these interviews will not be "custodial interrogations," there is no need to seek a waiver of Miranda rights.
>
> Unless the individual prefers to conduct the interview away from his home, workplace or neighborhood, you should ordinarily not ask him to accompany you to the police station or the field office. A number of these individuals may have difficulty with the English language and little understanding of our criminal justice system, and we want them and the other members of their communities clearly to understand that they are not being taken into custody and that the interviews are being pursued on a consensual basis.[24]

On November 12, 2001, Ralph Boyd, Jr., the Assistant Attorney General for Civil Rights, and Jeffrey Collins, the United States Attorney for the Eastern District of Michigan, held a news conference to discuss how the Justice Department would conduct the interrogations in Michigan. Due to the large number of Middle Eastern men located in the state of Michigan, the Justice Department would send letters "inviting" these men to come to "voluntary" interviews, as opposed to having investigators knock on doors at the homes of Arab men. At the news conference, Collins read a portion of the letter which stated:

> Your name was brought to our attention because, among other things, you came to Michigan on a visa from a country where there are groups that support, advocate, or finance international terrorism. . . .
>
> While this interview is voluntary, it is crucial that the investigation be broad based and thorough, and the interview is important to achieve that goal. We need to hear from you

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[24] Memorandum from the Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) [hereinafter Attorney General's Guideline Memorandum], *available at* http://www.usdoj.gov/04foia/readingrooms/terrorism2.htm. To highlight the consensual nature of the interviews, a spokeswoman for the Justice Department compared the questioning to a neighborhood canvass after a murder stating, "This is a preventive effort, focused on information gathering. . . . The instructions are clear. These are voluntary interviews, and anyone who doesn't want to answer questions doesn't have to." Wilgoren, *supra* note 22.

as soon as possible—by December 4.[25]

Boyd defended the interviews against criticism that the Justice Department was engaged in a dragnet interrogation process by explaining how the interviews were designed to assist the government's September 11 investigation: "You start out by casting your net broadly—overly broadly—and we narrow down to a group that is helpful."[26] In an attempt to make the interviews as comfortable as possible, Collins asserted that persons receiving the Justice Department's letter were free to bring an interpreter or lawyer and could choose the location of the interview.[27] Boyd conceded that some of the men targeted for interviews may have violated immigration laws, but he nonetheless claimed that this remained consistent with the Attorney General's earlier statement that these men were not criminal suspects.[28]

Boyd and Collins's news conference was held a few days after an internal memorandum from the Immigration and Naturalization Service (INS) was leaked to the press, which suggested that the interviews were a potential vehicle to identify immigration violators and persons connected with the Septem-

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[25] Jim Schaefer, *U.S. Softens Tactics in Terror Questioning*, DETROIT FREE PRESS, Nov. 27, 2001, at 1A; *see also* Allan Lengel, *Arab Men in Detroit to Be Asked to See U.S. Attorney*, WASH. POST, Nov. 27, 2001, at A5.

[26] Micheline Maynard, *U.S. Officials Explain Interview Plans at a Community Forum*, N.Y. TIMES, Nov. 21, 2001, at B7.

[27] Lengel, *supra* note 25.

[28] David Shepardson, *Community Airs Hate Crime Fears at Forum*, DETROIT NEWS, Nov. 21, 2001, at 3A. Boyd maintained that the interviews were strictly "voluntary." *Id.* ("Voluntary means voluntary. If someone doesn't want to be interviewed and says no, that's it."). However, some local police officials' comments may have signaled to the men on the list that the interviews were—for all intents and purposes—mandatory. For example, William Dwyer, the president of the Michigan Association of Chiefs of Police, suggested that Arab men could not simply fail to respond to the letter and expect to be off the hook. *See* Lengel, *supra* note 25 (noting Dwyer's emphasis on "follow-up" for people who did not interview with authorities since "we're at war"). In Florida, the president of the International Association of Chiefs of Police was more blunt about how "voluntary" the interviews were: "Agreeing with federal authorities that the interviews are voluntary, [one police chief] said it's in the [alien's] best interest to cooperate. If they say I'm not telling you, then you know what, you're going back home." Megan O'Matz & Jeff Shields, *Federal Queries Worry Muslims*, SUN-SENTINEL (Ft. Lauderdale), Nov. 29, 2001, at 1A.

ber 11 attacks.[29] The memo, written by an INS official, stated that immigration violators would be detained and held without bond.[30] According to the memo, requests by FBI agents "to detain immigration violators under 'no bond' should be honored and [would] be handled in the same manner as all prior cases with a direct nexus to the Sept. 11 investigation."[31] A spokeswoman for the INS acknowledged the existence of the memo but claimed that Attorney General Ashcroft's original policy remained intact: "Our primary purpose here is not identifying immigration law violations . . . but at the same time, it is our job to uphold the law. If we come across violators, we will report them."[32]

Arab-American groups, advocates for immigrants and even a few police chiefs protested that the Attorney General's order amounted to racial profiling. Some police officials who were asked to conduct the interviews publicly complained that the interviews violated their policies opposing racial profiling.[33] Some local police officials feared that the Justice Department's interrogations might violate civil liberties and create a false perception that the police were treating the interviewees as criminals,[34] while other police officials noted that the Justice Department had not explained how they had compiled the list of five thousand men.[35] Moreover, some police officials stated that they were confused about how to proceed with the interviews.[36] One deputy police chief in a Michigan suburb said,

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[29] *Memo Adds to Suspicions of Immigrants on Interviews*, N.Y. TIMES, Nov. 29, 2001, at B6.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See, e.g.*, Jodi Wilgoren, *University of Michigan Won't Cooperate in Federal Canvass*, N.Y. TIMES, Dec. 1, 2001, at B6 (citing police departments that refused to cooperate or objected to the Justice Department's program).

[34] *See* Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1 (quoting Detroit Police Chief Charles Wilson saying that "he did not want his officers to 'go out and treat people like criminals or even go out and find these people'").

[35] *Id.*

[36] Jodi Wilgoren, *Michigan Officers Fear Pressure of U.S. Plan*, N.Y. TIMES, Nov. 17, 2001, at B1 (quoting Robert Stevenson, a deputy police chief in Livonia, Michigan).

"We don't even know what we'd be looking for [when conducting the interviews.]"[37]

After the controversy surrounding the interrogations faded from the forefront of the national news media, a few thoughtful legal commentators decided that the interviews did not raise the worst problems associated with racial or ethnic profiling. Professor Eric Muller, an expert on the internment of Japanese-American citizens in the aftermath of the Pearl Harbor attack, has concluded that the Justice Department's "program of interrogation, if it was ethnic profiling at all, was ethnic profiling with a decidedly light touch."[38] Muller acknowledges the difficulty in accepting the government's initial claim that the interrogation program was ethnically neutral.[39] "But on closer examination," Muller finds that "the government's defense of its program is plausible."[40] Muller contrasts the mildness of the Justice Department's interviews with the coercive and oppressive nature of the federal government's policies toward Japanese aliens and Japanese-American citizens sixty years ago.[41]

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[37] *Id.*

[38] Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 577 (2002).

[39] *See id.* at 575. Muller notes:

> We might roll our eyes when our government today defends its interrogation program as ethnicity-neutral. After all, while the five thousand young men may not have been selected because they are Arab, we do know that they were selected because they arrived recently from countries where al Qaeda operates, and that certainly sounds like a pretext for anti-Arab discrimination.

Id.

[40] *Id.* at 575-76. In reaching this conclusion, Muller notes that the number of Arab aliens selected for interrogation, five thousand, was a small percentage—just under three percent—of the total number of Arab aliens living in the United States, which was approximately 170,000. "[A] number so small [seems] to suggest that the government did in fact target people for questioning on the basis of criteria other than the raw fact of their origin in an Arab country." *Id.* at 576. Muller also relies on the fact that "despite dire predictions that the supposedly information-gathering interviews would be mere pretext for coercive criminal interrogations, this turned out not to be so." *Id.*

[41] *See id.* at 591 (noting that the Bush Administration has not utilized extreme measures against aliens of Arab ancestry or Muslim faith but has "proceeded from a *premise* of moderation").

Professors Samuel Gross and Debra Livingston are undecided as to whether the interrogations constituted ethnic profiling.[42] Gross and Livingston contend that "even assuming that ethnicity was a central factor in the selection of subjects," it remains ambiguous whether this amounts to ethnic profiling.[43] According to Gross and Livingston, ethnic profiling does not occur if government officers "focus their attention on people of a given ethnicity because the police have information that the specific crime they are investigating was committed by someone of that ethnic group."[44] According to their analysis, the interrogations did not amount to ethnic profiling "if the sole purpose for this interview program was to determine whether any of the thousands to be interviewed was involved in this conspiracy, or had information that might lead to those who were."[45] Gross and Livingston concede, however, that

> the Justice Department's program *would* involve ethnic profiling if it was undertaken even in part based upon a general belief that Middle Eastern men are more likely to commit acts of terrorism than people of other ethnic groups—if it was based upon a global assumption about the criminal propensities of people of Middle Eastern descent.[46]

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[42] Gross & Livingston, *supra* note 2. Gross and Livingston attempt to answer the question of whether the interviews constitute racial or ethnic profiling by considering five factors, *see id.* at 1418-30, which they insist are "often inextricably intertwined." *Id.* at 1418.

[43] *Id.* at 1420.

[44] *Id.* Gross and Livingston later state that:

> The Justice Department's interview program may not be expressly aimed at [Middle Eastern Muslim men], but it has this effect. It *is* explicitly aimed at individuals from Middle Eastern countries and other countries with an al Qaeda presence—and for good reason. Although other groups and individuals have committed terrorist acts in the United States, before September 11 and probably after, it is very likely true that al Qaeda, an organization that consists entirely of Muslim men, primarily from the Middle East, poses the greatest immediate threat of mass terrorist killings.

Id. at 1422-23.

[45] *Id.* at 1421.

[46] *Id.* Gross and Livingston acknowledge that "it is probably impossible" to draw the type of distinction they propose in a case like the September 11 investigation, which involves a "far-flung conspiracy." *Id.*

In sum, Professors Gross and Livingston find it impossible to determine whether the Justice Department's interrogations constitute ethnic profiling: "The answer turns out to be a draw."[47]

Although reasonable minds might differ with Attorney General Ashcroft's assertion that the Justice Department compiled the list in an ethnically-neutral manner, there is no debate regarding one key aspect of the list. There was no evidence revealed to the public that the men targeted for interrogations had any connection with terrorism or the events of September 11. According to one police chief who was asked to conduct the interviews, neither the Justice Department nor the FBI provided any specific details on why the men were targeted for interrogation.[48] The Justice Department lacked even a reasonable suspicion to believe that any of the men selected for interrogation had committed a crime or had a connection with known terrorists or the September 11 attacks.[49] The bottom line is that the Justice Department was engaged in a fishing expedition to find individuals who might know something about the horrific events of September 11.

In my view, the timing and criteria used to target the men for interrogation and the methods employed by the federal

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[47] *Id.* at 1436. Gross and Livingston assert that the interview process is:

> ethnic profiling to the extent that the FBI is operating on a general assumption that Middle Eastern men are more likely than others to commit acts of terror; it is not to the extent that the agents are pursuing case-specific information about the September 11 attacks, albeit in a dragnet fashion. In practice, we cannot separate or distinguish between these two conditions.

Id.

[48] *See* Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7 (describing the complaint of the acting Police Chief of Portland, Oregon, that the FBI list "contained 'no specifics' about what crimes the 5,000 men might be involved with"); *see also* Butterfield, *supra* note 34 (noting concern of the executive director of the Police Executive Research Forum that local police departments that have been asked to conduct interviews were not told "why certain names were put on the list. All that has been said is that the men have legally traveled to the United States in the past two years from nations with suspected terrorist links.").

[49] Butterfield, *supra* note 34.

government indicate that the Justice Department's list is a clear example of ethnic profiling. Justice Department officials were responding to a national emergency while also trying to prevent future attacks. The nineteen terrorists who conducted the attacks on September 11 came from Middle Eastern countries. If the government was interested in gathering information about future terrorism, common sense indicates that the government should question individuals with similar backgrounds. As the special agent in charge of the Detroit FBI office conceded, this might be a form of profiling, but the government had little choice: "Terrorists aren't born. Terrorists have to recruit members. It doesn't make much sense to go to people in northern Canada and talk to them about it."[50]

While the timing and release of the list appears logical—the nation had been recently attacked by a terrorist network devoted to the destruction of Americans—the list raised the fears of those selected for interrogation. Arabs and Muslims living in this country understood the need for an investigation, but many critics of the Justice Department's interrogations viewed the list as a government investigation focused on ethnicity rather than on suspicious conduct.[51] As the executive

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[50] Jim Schaefer, *840 Face Anti-Terror Net Locally: Men with Mideast Ties to be Questioned*, DETROIT FREE PRESS, Nov. 15, 2001, at 1A (quoting special agent John Bell as "acknowledg[ing] that the interviews could be seen as profiling—all the men are Middle Eastern, all ages 18 to 33—but said the government has little choice. The effort aims to find anyone who may have had contact with bin Laden's al-Qaeda organization."); *see also* COLE, *supra* note 4, at 53 (noting that, "[i]n the immediate aftermath of the September 11 attacks, a reasonable argument could be made that the use of ethnic and immigrant identity as factors in the investigation of those attacks did not constitute ethnic profiling"). *Cf.* Steve Brill, *The FBI Gets Religion*, NEWSWEEK, Jan. 28, 2002, at 32. Brill argued that law enforcement officers,

> like reporters, always have to question lots of people in hopes of finding someone who might know something or someone—or who might later hear about someone who knows someone. The only thing that has to be justified is the decision to target people coming from particular countries, and that kind of 'profiling' becomes a lot less controversial once the mindset—and the articulated goal—has to do with getting information, not grilling suspects.

Id.

[51] *See* Wilgoren, *supra* note 22 (noting that Arabs and Muslims living in the United States felt "the government is sanctioning suspicion based on background,

director of the American Arab Chamber of Commerce asserted, "[w]e've gone from an investigation into the attacks committed [on] Sept. 11 to investigating an entire race, and that's dangerous."[52] Many students from Middle Eastern countries, for example, were fully aware, like everyone else, that the September 11 attackers allegedly "plotted the attacks in Germany and England, and suspected ringleader Mohamed Atta traveled to Spain and the Czech Republic."[53] Despite these connections to certain European nations, the Justice Department did not announce that foreign students from European countries were targeted for interviews. The director of international education at the University of Colorado summarized the views of many Middle Eastern students when he noted, "[t]he students are not sure what the purpose of the questions are [sic] . . . [b]ut they know that the government isn't interviewing any students from Germany."[54]

Moreover, the publicly announced criteria used to compile the list "certainly sounds like a pretext for anti-Arab discrimination."[55] While Bush Administration officials insisted that the list was ethnically-neutral, the distinction drawn by these officials—that a classification based on nationality is different from a classification based on ancestry or ethnicity—is often ambiguous. As Professor Mariano-Florentino Cuellar recently noted:

> Race and national origin often correlate highly, can be observed in tandem, and are treated similarly in constitutional

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not behavior").

[52] Geralda Miller, *Federal Plan to Interview Arab Men Called "Dangerous,"* GRAND RAPID PRESS, Nov. 21, 2001, at D6 (quoting Nasser Beydoun, executive director of the Arab Chamber of Commerce).

[53] Karen Gullo, *Investigators Questioning 5,000 Foreigners in U.S.*, SEATTLE TIMES, Nov. 14, 2001, at A5.

[54] Jacques Steinberg, *A Nation Challenged: The Students, U.S. Has Covered 200 Campuses to Check Up on Mideast Students*, N.Y. TIMES, Nov. 12, 2001, at A1 (quoting Larry Bell, Director of International Education of University of Colorado); *see also* COLE, *supra* note 4, at 49 (noting persons targeted for questioning were from countries "where support for Al Qaeda was believed to exist, but apparently did not include Great Britain, France, Spain, or Germany, even though Al Qaeda suspects from each of these countries have been captured").

[55] Muller, *supra* note 38, at 575.

> adjudication. Both kinds of profiling involve a probability judgment that a particular person is worth the attention of law enforcement, whether at the investigative, administrative enforcement, or prosecution stage.[56]

Justice Brennan made a similar observation in *Saint Francis College v. Al-Khazraji*,[57] writing that "the line between discrimination based on 'ancestry or ethnic characteristics,' and discrimination based on 'place or nation of . . . origin,' is not a bright one."[58] Classifications based on ethnicity and nationality can be two sides of the same coin. As Justice Brennan recognized, a person can be born into a nation whose "primary stock is one's own ethnic group."[59]

Finally, when one combines the razor-thin distinction proffered by the Justice Department with the dragnet qualities of the interrogations, it becomes difficult to avoid the suspicion that the Department is trying to have it both ways. The Department vehemently denies that the list constitutes ethnic profiling, but simultaneously insists on the authority to conduct suspicionless interrogations of men from Middle Eastern countries that are dominated by persons of Arab ancestry. As Professor David Cole characterized the Department's list, "[t]his is as close as you get to ethnic profiling without literally relying on ethnicity."[60] While Department officials and others insist

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[56] Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 16 (2003).

[57] 481 U.S. 604 (1987).

[58] *Al-Khazraji*, 481 U.S. at 612 (Brennan, J., concurring) (citations omitted).

[59] *Id.* (conceding that ancestry and nation original are not always the same; "[o]ften, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group").

[60] Gullo, *supra* note 53; *see also* Lisa Biank Fasig, *ACLU Urges Police: Refuse to Help U.S. Government Detain Immigrants*, PROVIDENCE JOURNAL-BULLETIN, Dec. 3, 2001, at B3 (quoting executive director of Rhode Island ACLU, describing list as, "nothing but thinly disguised racial profiling"). In a subsequent detailed discussion of the topic, Professor Cole concludes that the government's list of Arab and Muslim men selected for interviews and other policies that target only Arabs and Muslim aliens "look[s] like what a clever young lawyer would come up with if directed by his superiors to 'develop a program for targeting Arabs and Muslims but make sure we can deny that it is ethnic profiling.'" COLE, *supra* note 4, at 52. According to Cole:

> [A]s the September 11 investigation turned into a more general war on

that the list is ethnic-neutral, the persuasiveness of this claim may depend on whether you are one of the men targeted on the government's list. Under the circumstances, the Justice Department's distinction between ethnicity and national origin is distinctly reminiscent of the claim that discrimination on the basis of pregnancy is not gender discrimination,[61] and discrimination on the basis of Spanish language ability is not ethnic discrimination.[62] The persuasiveness of those assertions may also turn on whether you are a woman or bilingual.[63]

A few years ago, the traffic enforcement practices of the New Jersey State Police made national headlines due to allegations of racial profiling by individual troopers. Imagine if the commander of the State Police defended his troopers with the following reply:

> We are not engaged in racial profiling of black drivers per se. Troopers do not target or stop black female drivers, nor do troopers target or stop older black drivers, whether male or female. Troopers only target young, male African-Americans,

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terrorism of indefinite (and potentially infinite) duration, encompassing not a specific locality but the whole nation and indeed the entire world, and not a specific group but all "terrorists of global reach," the Justice Department's reliance on Arab and Muslim identity has come to look more and more like the Army's use of Japanese ancestry as a proxy for suspicion during World War II.

Id. at 54.

[61] *See* Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974) (holding that a state's insurance program that excluded disability protection for normal pregnancy and childbirth was not invidious discrimination against women under the Equal Protection Clause). *Cf.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 264 (1993) (ruling that animus towards abortion did not constitute class-based animus towards women under federal civil rights statute).

[62] *See* Hernandez v. New York, 500 U.S. 352, 360-62 (1991) (holding that prosecutor's use of peremptory challenges to exclude potential jurors who were bilingual is not forbidden ethnic discrimination under Equal Protection Clause).

[63] Justice Department officials might have been more credible if they had acknowledged that the men were included on the list because of their ethnicity, and that a national emergency justified the ethnic classification. *See* Korematsu v. United States, 323 U.S. 214, 219-20 (1944) (compelling governmental interest justified racial classification). *Cf.* William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31 ("To meet a terrorist emergency, of course some rules should be stretched and new laws passed. An ethnic dragnet rounding up visa-skippers or questioning foreign students, if short-term, is borderline tolerable.").

> who drive new model vehicles or rental cars, which is only a small sub-set of all the black drivers who travel on the Turnpike.

I suspect that many would quickly dismiss this explanation of why New Jersey State troopers disproportionately stop young, black drivers as a sham. Yet Justice Department officials and others appear to offer a markedly similar analysis by insisting that targeting five thousand young aliens from Arab countries does not amount to ethnic profiling. The federal government claims that targeting these men from predominately Arab countries is not the equivalent of targeting Arabs per se. Yet if this explanation is sufficient to repel a charge of ethnic profiling, then the reply of my hypothetical commander of the New Jersey State Police is an equally plausible defense to charges of racial profiling.

Consider the reaction of police officials in a small, rural and predominately white town in upstate New York following the attack of a seventy-seven-year-old white woman. The woman said, "her attacker was a black man wielding a 'stiletto-style' knife whose arms and hands she cut fending them off."[64] Police officials then compiled a list of the black and Hispanic male students registered at the State University of New York College at Oneonta.[65] Police and campus police officers then used the list "to track down black and Hispanic students in their dormitories, at their jobs and in the shower. From each, the police demanded to know his whereabouts when the attack occurred; each had to show his arms and hands."[66] When no suspects were immediately apprehended, the police then "conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts."[67] Over two hundred individuals were questioned during

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[64] Diana Jean Schemo, *College Town in Uproar Over "Black List" Search*, N.Y. TIMES, Sept. 27, 1992, at 33; *see also* Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000).

[65] *Brown*, 221 F.3d at 334.

[66] *Id.*

[67] *Id.*

a period of several days.[68]

A federal appeals court subsequently concluded that the police action in Oneonta did not amount to a racial classification under the Equal Protection Clause.[69] Compiling a list of black and Hispanic students and subjecting those individuals to interrogation (and possibly detention) was not "racial profiling" per se because police focused on "not only race, but also gender and age, as well as the possibility of a cut on the hand."[70] Although the federal judiciary viewed the police practices in Oneonta as race-neutral, others disagreed with that assertion.[71] While my objective is not to re-litigate the issue in *Brown v. City of Oneonta*, I mention the Oneonta "list" because, similar to the Justice Department "list," deciding whether governmental action constitutes racial or ethnic profiling is sometimes a judgment call.[72]

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[68] *Id.*

[69] *Id.* at 337.

[70] *Id.*

[71] *See, e.g.,* Alschuler, *supra* note 1, at 181 ("Presumably the police [in Oneonta] did not classify by age or gender either, because they did consider race. In the magic land of Oneonta, police officers who classify on more than one basis classify on none. One plus one equals zero."); Ramirez, et al., *supra* note 1, at 1219 (noting that the ruling "illustrates the folly of attempting to stop or question every person who fits a general description such as 'young black male' without relying on any more specific and readily identifiable characteristics. To do so allows police to focus almost exclusively on the racial element of the victim's description."); Bob Herbert, *In America; Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29 (asserting that the police response in Oneonta "went far beyond the problem of driving while black. People were being stopped in Oneonta for breathing while black."). *Cf.* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (criticizing the widely accepted distinction between racial profiling, which is generally condemned, and the use of a race-based perpetrator description, which is generally accepted as a permissible use of race by law enforcement officials).

[72] Defining ethnic or racial profiling in this context is no easy task. Although I do not offer a bright line rule defining ethnic profiling, I do share the views expressed in a report issued by the New Jersey Attorney General's Office on racial profiling in the context of traffic enforcement. The New Jersey Attorney General defined racial profiling broadly "to encompass any action taken by a state trooper during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists." Verniero & Zoubek, *supra* note 3, at 47. In other situations, determining whether a racial classification exists is easy. *See* Korematsu v. United States, 323 U.S. 214, 216-20 (1944).

In my view, the distinction proffered by the Justice Department—classifying Arab aliens based on nationality versus classifying Arabs aliens based on ancestry or ethnicity—is unpersuasive given the context. The government was responding to a national emergency and knew that all of the September 11 attackers came from a Middle Eastern nation. The government's objective was to locate others who might have aided the September 11 attacks or knew of future attacks. The Justice Department then proceeded to compile a list of young men from mostly Middle Eastern and Muslim nations, and subsequently targeted those men for "voluntary" interviews with federal Anti-Terrorism Task Force officers. Although conceding that none of the men on its list were criminal suspects, and lacking any reasonable suspicion that the men were connected specifically with the September 11 attacks or terrorist organizations, the government claimed that these men might have helpful information for law enforcement's September 11 investigation. In light of these circumstances, the government's investigative procedure following September 11 amounted to an ethnic-based fishing expedition.[73]

B. Were The Interviews "Seizures" Under The Fourth Amendment?

Whether the Justice Department's list amounts to ethnic or racial profiling is immaterial for determining the permissibility of the interviews under the Fourth Amendment. As previously noted, an officer's subjective intent or racial bias is irrelevant to ordinary police procedures according to *Whren*. The Fourth Amendment issue in *Whren* arose from a traffic stop, which obviously constitutes a seizure. The Department, of course, insists that the interviews were not "seizures" under the Fourth Amendment because they were consensual. To determine the validity of this assertion, it is inconsequential wheth-

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[73] Defending the interview process, the Justice Department's top civil rights official, Ralph Boyd, Jr., offered a polite description of the "dragnet" procedure employed by the Department: "You start out by casting your net broadly—overly broadly—and we narrow down to a group that is helpful." Maynard, *supra* note 26.

er the judiciary believes that the list itself or the motivations behind the compilation of the list constituted racial or ethnic profiling. While it may seem illogical to the non-lawyer, the question of whether the interviews trigger Fourth Amendment protection is unrelated to determining if the government's decision to conduct the interviews was motivated by ethnic concerns.

The Justice Department maintained that the interrogation of young aliens did not implicate the Fourth Amendment because the interviews were voluntary. On the other hand, opponents of the government's interview procedure contend that many of the men targeted for questioning felt they were in no position to resist the government's request. Someone unfamiliar with nuances of the Supreme Court's search and seizure doctrine might find the government's claim hard to swallow. The Department's position, however, is supported by the Court's precedent.[74] The Court has stated that police questioning typically does not trigger constitutional scrutiny.[75] A seizure occurs under the Fourth Amendment only when a person no longer feels free to leave a police-citizen encounter or does not feel free to avoid or terminate police contact.[76] Although police officials are permitted to question a person without cause or suspicion of criminality, *according to the law*, that person is equally free to ignore the police inquiry.[77] Moreover, a person's decision to leave the scene of a police encounter or refusal to cooperate with the police does not provide legal cause for police detention of the individual.[78]

The Court's most recent decisions clarify the tactics that law enforcement officials may use to question individuals without raising constitutional concerns. *United States v. Drayton*[79] addressed the constitutionality of a "bus sweep" conducted by Tallahassee, Florida police officers.[80] Ten years earlier, in

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[74] *See* Florida v. Bostick, 501 U.S. 429 (1991).

[75] *Bostick*, 501 U.S. at 434; Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion).

[76] *Bostick*, 501 U.S. at 434.

[77] *Id.* at 435-36

[78] *See Royer*, 460 U.S. at 497-98.

[79] 536 U.S. 194 (2002).

[80] *Drayton*, 536 U.S. at 203-04. During a bus sweep, police officers systemati-

Florida v. Bostick, the Court ruled that bus sweeps were not a separate category of police-citizen encounters under the Fourth Amendment.[81] *Bostick* held that a seizure does not occur simply because a police confrontation unfolds inside the cramped confines of a bus.[82] *Bostick* explained that bus sweeps should be judged by the same standard applicable to other police-citizen encounters: considering "all the circumstances surrounding the encounter," would a reasonable person feel free to terminate or avoid the encounter?[83]

The issue in *Drayton* concerned "whether officers must advise bus passengers during these encounters of their right not to cooperate."[84] *Drayton* involved the following facts: during a stop in Tallahassee, three police officers boarded a Greyhound bus en route from Fort Lauderdale, Florida to Detroit, Michigan.[85] After the driver left the bus, one officer sat on the driver's seat and watched the rear of the bus.[86] The other two officers, Lang and Blackburn, proceeded to the rear of the bus and began questioning passengers.[87] Lang approached Drayton and Brown, who were seated next to each other with Drayton sitting in the aisle seat. Lang identified himself as a police officer, put his face within twelve to eighteen inches of Drayton's face and said in a quiet tone: "I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?"[88] Drayton and Brown pointed to a bag in the luggage rack, and Lang received their permission to search the bag.[89] After failing to find incriminating evidence in the bag, Lang asked if either man was carrying weapons or drugs on their

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cally or randomly question passengers about their itinerary and seek consent to search the passenger's person or luggage.

[81] *Bostick*, 501 U.S. at 439-40.

[82] *Id.* at 439.

[83] *Id.*

[84] *Drayton*, 536 U.S. at 197.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 197-98.

[88] *Id.* at 198.

[89] *Id.*

persons.[90] Lang first requested and received permission to search Brown. Lang frisked Brown and discovered hard objects near Brown's thighs that he suspected were packages of drugs.[91] Brown was subsequently arrested and removed from the bus.[92] Lang then asked and obtained Drayton's permission to search his person.[93] A patdown of Drayton's thighs revealed similar hard objects.[94] Drayton was arrested and a later search of the men disclosed packages of powder cocaine taped between several pairs of boxer shorts.[95]

Addressing the constitutional validity of the officers' encounter, the Court decided whether Drayton and Brown voluntarily consented to the search and if a seizure had occurred under the Fourth Amendment.[96] With regard to the issue of seizure, the Court first criticized the Eleventh Circuit for adopting "what [was] in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search."[97] Speaking for the majority, Justice Kennedy reiterated the Court's previous view that per se rules are inappropriate for determining if a police-citizen encounter constituted a seizure.[98] Applying the traditional "totality" test, Justice Kennedy found that a seizure had not occurred when the officers "boarded the bus and began questioning passengers."[99] According to Justice Kennedy, the facts reflected an encounter that was cooperative and devoid of coercion or confronta-

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[90] *Id.* Apparently Officer Lang's suspicions were aroused because Drayton and Brown "were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics." *Id.* at 199.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 200 (explaining that Drayton and Brown "were not seized and their consent to search was voluntary").

[97] *Id.* at 202.

[98] *Id.* at 201.

[99] *Id.* at 203.

tion.[100] "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."[101]

To bolster his conclusion, Justice Kennedy asserted, without proof or empirical support, that the surroundings of the bus may have enhanced a person's confidence during a police encounter: "[B]ecause many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances."[102] Justice Kennedy also asserted—again without empirical support—that "bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."[103]

In addressing whether Drayton and Brown voluntarily consented to the search, Justice Kennedy initially noted that, "where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts."[104] Once the Court coupled the seizure and con-

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[100] *Id.* at 203-04.

[101] *Id.* at 204.

[102] *Id.*

[103] *Id.* at 205. Justice Kennedy was unimpressed with the defendants' claims that Officer Lang's displaying of his badge, the position of the officer who sat in the driver's seat and Lang's testimony that very few passengers refuse to cooperate with his requests, supported their argument that a reasonable person would not feel free to resist Lang's inquiries. *Id.* at 204-05.

[104] *Id.* at 206. Justice Kennedy's analysis wrongly conflates the issues of "consent" and "seizure." In *Drayton*, Justice Kennedy "implicitly adopted the same 'free to refuse/terminate' test for deciding voluntariness of consent to search that has been used since *Bostick* for deciding the seizure question." Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 162. This is not the first time the Court has confused the issues of consent and seizure—the *Bostick* Court made a similar error. *See* 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.3(c), at 122 (3d ed. 1996) (noting that the *Bostick* Court remanded the issue to Florida courts to determine whether Bostick had consented to search of his luggage). Despite Justice Souter's observation that the issues of consent and seizure involve considering different criteria, *Drayton*, 536 U.S. at 208 n.1 (Souter, J., dissenting), Justice Kennedy refused to alter his assertion that "where the question of voluntariness pervades both the search and seizure

sent analyses, it became evident that the Court would ultimately hold that Drayton and Brown voluntarily consented to the search of their luggage and persons. The absence of police notification that the men had a constitutional right to refuse consent was inconsequential. "Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable."[105]

Within one year of *Drayton*, the Court decided *Kaupp v. Texas*,[106] a unanimous per curiam ruling. *Kaupp* addressed whether seventeen-year-old Robert Kaupp had been seized when several police officers entered his home at approximately 3 a.m., awoke a sleeping Kaupp after his father allowed the officers into the home and told Kaupp "we need to go and talk."[107] Kaupp replied, "'Okay,'" and was then handcuffed

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inquiries, the respective analyses turn on very similar facts." *Id.* at 206. Justice Kennedy's opinion may be signaling a change in the law. In *United States v. Mendenhall*, 446 U.S. 544 (1980), a majority of the Court adopted the "totality of the circumstances" standard announced in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for determining the voluntariness of a person's consent under the Fourth Amendment. Under *Schneckloth*, voluntariness for Fourth Amendment purposes considers "the characteristics of the accused," 412 U.S. at 226, "the nature of a person's subjective understanding" of the police confrontation, *id.* at 230, as well as all the objective facts surrounding the police-citizen encounter, *id.* at 233. In *Mendenhall*, a majority of the Court agreed that Mendenhall's race, gender and educational background were "not irrelevant" to the issue of whether Mendenhall had consented to accompany two white male federal Drug Enforcement Administration agents to an interrogation room. 446 U.S. at 558. Perhaps, Justice Kennedy's opinion in *Drayton* was meant to signal that when deciding consent questions, judges should no longer focus on the subjective considerations and perceptions of the police target but instead focus on the hypothetical "reasonable" individual.

[105] *Drayton*, 536 U.S. at 207. After this statement, Justice Kennedy added a curious paragraph:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id.

[106] 123 S. Ct. 1843 (2003) (per curiam).

[107] *Kaupp*, 123 St. Ct. at 1845.

and escorted from his home "shoeless and dressed only in boxer shorts and a T-shirt" to a patrol car.[108] The police drove Kaupp to the location where the victim's body had been recovered, and later to the police station.[109] At the station, Kaupp was taken to an interrogation room, given his *Miranda* warnings and eventually confessed to his involvement in the murder of his half-sister.[110]

The Supreme Court quickly and easily reversed the Texas Court of Appeals conclusion that Kaupp had not been seized until after his confession. The Court explained that the facts "show[] beyond cavil" that Kaupp had been seized and arrested when the police escorted him from his home,[111] and there was no basis for concluding that Kaupp had voluntarily consented to leave his home with police.

> Kaupp's "Okay" in response to [Detective] Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "we need to go and talk" presents no option but "to go." There is no reason to think Kaupp's answer was anything more than "a mere submission to a claim of lawful authority."[112]

The nature of Kaupp's trip to the police station provided further evidence that police had seized Kaupp prior to his con-

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[108] *Id.* The police suspected that Kaupp had been involved in the murder of his half-sister. *Id.* at 1844.

[109] *Id.* at 1845.

[110] *Id.*

[111] The Court concluded that under a "straightforward application" of the reasonable person test, Kaupp had been seized. *Id.* at 1846.

> A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated 'we need to go and talk.' He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned.

Id. The Court asserted that "[t]his evidence points to arrest even more starkly than the facts in *Dunaway v. New York*, 442 U.S. 200, 212 (1979)." *Id.*

[112] *Id.* at 1847 (quoting Florida v. Royer, 460 U.S. 491, 496 (1983) (plurality opinion)).

fession. In the Court's view, "removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters" had all the earmarks of an arrest.[113] Finally, the sheriff's department's practice of "'routinely'" transporting people in this manner for safety purposes, and Kaupp's failure to protest the police process, did not undermine the Court's judgment that a seizure had occurred.[114]

To the untrained eye, *Drayton* and *Kaupp* may appear to be polar opposites on a wide spectrum of police-citizen encounters: *Drayton* illustrates one end of the spectrum that allows police questioning without triggering constitutional safeguards; *Kaupp* depicts the other end representing those police practices that are not considered consensual encounters. For the vast middle ground between the two ends, police-citizen encounters are judged on a case-by-case basis according to a reasonable person standard. This interpretation of *Kaupp* and *Drayton* is erroneous. *Drayton* and *Kaupp* are not polar opposites but instead illustrate different legal principles. A police-citizen encounter is not considered a seizure, regardless of how coercive the encounter might be from an individual's perspective, *unless* the police engage in patently abusive and intimidating behavior.[115] When properly understood, *Drayton* represents

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[113] *Id.*

[114] *Id.* The Court explained that police "motivation of self-protection does not speak to how their actions would reasonably be understood" and "failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer." *Id.*

[115] *See* Nadler, *supra* note 104, at 163 (noting *Drayton* Court's "unstated concern—that the police be permitted to engage in suspicionless seizures and consentless searches so long as they avoid abusive or overly coercive tactics—is masked by its stated holding that citizens are not seized or involuntarily searched within the meaning of the Fourth Amendment if they feel free to refuse police requests"); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 n.102 (2002) (asserting that no one considers the Court's definition of "seizure" serious "since hardly anyone feels free to walk away from a police officer without the officer's permission. The actual (though unarticulated) definition is more like this: One is seized when a police officer behaves with a higher level of coercion than is ordinarily and reasonable in a brief street encounter."); *see, e.g.*, *Bostick*, 501 U.S. at 437 (expressing doubt that a seizure had occurred during a

the enormous discretion and power of police to accost and interrogate persons without constitutional safeguards. *Kaupp*, on the other hand, illustrates the rarely invoked exception.[116] In sum, *Drayton* and *Kaupp* symbolize the very narrow protection the Fourth Amendment provides against coercive police encounters.

When the constitutional validity of the Justice Department's voluntary interviews project are measured by standards reaffirmed in *Drayton* and *Kaupp*, it is highly unlikely that any court will find that the interrogation sessions constituted seizures under the Fourth Amendment. Evidence regarding the conduct of investigators during the interviews is sporadic and anecdotal and comes primarily from press reports. Newspaper stories suggest that the interviews never approached conditions that would trigger constitutional safeguards.[117] There have been no reports of the type of police conduct that provoked the Court to reverse the judgment in *Kaupp*. No examples have surfaced involving the application of physical force, intimidating movements, overwhelming displays of force, brandishing of weapons, blocking of exits, threats, commands or use of authoritative tone of voice.[118] Media accounts generally indicate that the interrogation sessions were consensual encounters under the Fourth Amendment. Even one of the more outrageous incidents described by the press fell far short of the conduct condemned in *Kaupp*.[119]

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bus sweep, majority notes that "officers did not point guns at [the passenger] or otherwise threaten him").

[116] *Cf.* Hayes v. Florida, 470 U.S. 811, 815 (1985) (forcibly removing suspect from his home or other place, transporting him to the police station and detaining him at the station for investigative purposes is sufficiently like arrest to require probable cause).

[117] *See* Brill, *supra* note 50, at 33 ("According to lawyers who sat in on 220 interviews across the country and nine people who were interviewed without lawyers, the sessions were polite, even solicitous. Gone were the grillings about prayer habits or votes cast. The agents asked the young immigrants 21 relatively benign questions from a script."); Niraj Warikoo, *Interviews of Arab Men Are Finished*, DETROIT FREE PRESS, Feb. 7, 2002, at 1B (noting that "two months and 300-plus interviews later, Arab-American leaders say the process in Michigan wasn't as bad as they expected").

[118] *See Drayton*, 536 U.S. at 204 (listing criteria that might invoke Fourth Amendment protection).

[119] Columnist Steven Brill described Ali Erikenoglu's encounter with FBI

In light of *Drayton*, it is very unlikely that any judge would find that the interviews constituted seizures. Although prevailing constitutional standards support the Justice Department's contention that the interrogation sessions were consensual, the soundness of that conclusion is tenuous at best. From both an objective and subjective perspective, it is difficult to imagine that a young Arab alien would feel free to refuse or ignore the federal government's request for an interview.[120] After the ini-

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agents:

> At about 10:30 on the night of Sept. 20, [2001,] Ali Erikenoglu heard rustling in the bushes below his bedroom in the small, three-family home he owns in Paterson, N.J. He got up, leaned out the window and saw, he says, "four or five men with flashlights" in his backyard. The men identified themselves as the FBI and told him they needed to ask him some questions.
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> . . . .
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> Erikenoglu says that while two agents roamed the apartment (except for the bedroom, where his wife remained sleeping) examining books, videos, religious plaques and papers, two others made him produce his license and passport, and his wife's passport. They spent about an hour asking a series of questions about how often he prays, what tourist sites he had visited, how often he had traveled abroad, "what kind of American are you" and "what is it about your religion that allows people like these terrorists to do what they did?"
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> Erikenoglu says the agents finally told him that someone from one of the construction jobs he had worked on had called and said that he had expressed sympathy for the terrorists after the bombing of the USS Cole. "I told them I never said anything like that," says Erikenoglu. "I complained that this is like McCarthyism—-some anonymous person calls up, or maybe doesn't call up, but you have a Muslim name and there's the knock on the door asking who you voted for."
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> On the way out, Erikenoglu claims, one agent promised: "We'll be back to take you in cuffs if we find that one thing you told us is a lie, or if we find that any of your phone numbers got a call to or from a terrorist."

Brill, *supra* note 50, at 32-33.

[120] *See Morning Edition: Lawyers Speak Out About Immigration Charges Brought Against Foreigners in the US* (National Public Radio, Dec. 5, 2001). Karen Pennington, a Texas lawyer who has represented individuals targeted for interviews, stated that the "FBI has a great deal of control over these men's lives and that they may be putting themselves at risk should they fail to cooperate." *Id.* Pennington further asserted that once these men are approached, the interviews "become not voluntary but rather something that they will be compelled to participate in." *Id.* Mr. Omar Mahmood, a PhD student and American citizen who spent time studying in Yemen, agreed to meet with FBI officials with an attorney present. *Morning Edition: How Individual Rights Faring Under Law Enforcement's*

tial announcement of the Justice Department's interview procedures, press reports indicated that some Arab students experienced a great deal of anxiety. First, these students feared the power of the federal government. One Syrian student described his fear when he met two FBI agents on campus. The morning before the interview, the agents had gone to his home and told his mother that they wanted to ask him some questions.[121] The power and reputation of the FBI does not require an extended explanation,[122] and many young aliens in this country understand that a request from a FBI agent or federal prosecutor for an interview should not be ignored.[123]

New Powers in the War on Terror's Domestic Front (National Public Radio, Sept. 5, 2002). Mr. Mahmood found the interviews to be "[a] little daunting at first, but then after having gone through it, I felt that it wasn't that bad. It just felt like two guys were trying to do their job." *Id.* Mahmood, however, articulated the fears of other Arab-Americans: "It's easy to say you have nothing to hide, you should welcome these types of investigations when your house has already been raided, when your computer has never been confiscated, when your personal recordings have not been erased and taken away." *Id.* Twice in 2002, the FBI raided the home of Mahmood's father-in-law, even though he had not been charged. *Id.*

[121] Greg Winter, *F.B.I. Visits Provoke Waves of Worry in Middle Eastern Men*, N.Y. TIMES, Nov. 16, 2001, at B1.

[122] *See, e.g.,* DIARMUID JEFFREYS, THE BUREAU: INSIDE THE MODERN FBI 7 (1995). The author quotes an FBI agent with twenty years of experience:

> Nobody here talks much about [former FBI Director J. Edgar] Hoover anymore, nobody even thinks about him much. But his spirit is still with us. He's still the best director we ever had. Sure he did some dreadful things and he made some big, big mistakes, and I for one will tell you that that makes me ashamed. But there's this other side that is always ignored. He built an organization that couldn't be intimidated by anyone. To this day people think twice before they take on the FBI, and for good reason. Let me tell you, every time I go out there on the streets I give thanks that he did so.

Id.

[123] *See* Todd Richissin, *Critics Seek Limit to Terror Inquiries*, BALT. SUN, Dec. 22, 2001, at 1A. After *Drayton*, in some settings, the legal analysis used to determine whether an alien was "seized" will be the same analysis used to determine whether the alien "consented" to a police search or seizure. *Drayton*, 536 U.S. at 206 ("In circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts."); Nadler, *supra* note 104, at 162 (noting that seizure and consent issues "have essentially merged in *Bostick* and *Drayton*"). Prior to *Drayton*, some courts held that an alien's background is relevant in determining whether a seizure occurred. *See, e.g.*, United States v. Grant, 920 F.2d 376, 382, 383 (6th Cir.

For some Arab aliens, a stigma is directly attached to the interviews. A law student at Washington University in St. Louis compared the process to a round up of Arabs. "We want to see the perpetrators brought to justice, but this sort of sweeping investigation really carries with it the potential of marginalizing an entire demographic" population.[124] If members of an ethnic group feel marginalized or targeted for suspi-

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1990) (explaining that "the characteristics of a particular defendant" were relevant to the issue of whether a seizure had occurred, and concluding that "[d]ue to his ignorance of police practices in the United States and his status as an alien, [the defendant] most likely felt compelled to answer the agents' questions and to submit to their demands"). The analysis in *Grant* is inconsistent with the Court's repeated instructions, prior to *Drayton*, that the seizure issue should be determined from the perspective of the objective, "reasonable" person. *See Bostick*, 501 U.S. at 438 (seizure analysis presupposes reasonable, innocent person); *Mendenhall*, 446 U.S. at 554 (plurality opinion). Thus, "characteristics of a particular defendant," *Grant*, 920 F.2d at 382, would seem to be irrelevant to the seizure issue. On the other hand, a person's status as an alien should be relevant to the question of consent because "the characteristics of the accused" and "the nature of a person's subjective understanding," *Schneckloth*, 412 U.S. at 226, 230, are relevant to the issue of consent. Accordingly, courts may properly consider a person's alien status when determining the voluntariness of consent under the Fourth Amendment. For example, see the result in *People v. Valenzuela*, 33 Cal. Rptr. 802 (Ct. App. 4th Dist. 1994), where the California Court of Appeals found the alien-defendant's consent to a search was involuntary because, among other reasons:

> An American of normal intelligence might well be presumed to know his or her rights. The mere fact of an arrest would not necessarily affect an American defendant's knowledge of his or her rights. A foreigner may not be so well informed, however. To an alien, who is present in the country on sufferance and whose privilege to be here can be revoked, a request made by an official of the host (foreign) government may well not, in fact, imply a right to refuse such an official request. The risk of refusal may be too great. A person's experiences with authority figures may also reasonably indicate that compliance is mandatory. In addition, depending on the cultural customs and mores of the alien's home country, he or she may not appreciate the subtlety—assumed in this culture—that making a request implies a right to refuse.

Valenzuela, 33 Cal. Rptr. at 811-12 (footnote omitted). As noted earlier, *see supra* note 104, perhaps *Drayton* signals a change in the law regarding consent and whether a person's subjective characteristics are relevant to the issue of consent. There is no uncertainty, however, that *Drayton* reaffirmed the "reasonable person" test for determining whether a seizure has occurred. *See Drayton*, 536 U.S. at 202 ("The proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.") (quoting *Bostick*, 501 U.S. at 436).

[124] Wilgoren, *supra* note 22.

cion by the most powerful law enforcement agency in the country, it is difficult to imagine these same individuals exercising their right to say "no" when agents or prosecutors request a "voluntary" interview. Furthermore, many lawful resident aliens from Arab countries described another reaction—one that many Americans might not experience upon receiving a request for an interview from law enforcement officials. For instance, one Arab student noted his fear that, in light of the interview process, "Arab-Americans [would] try to hide their origins."[125] Other Arab individuals living in the United States worried that they might be suspected of sympathizing with terrorists if they criticized United States policy in the Middle East.[126]

In addition to these subjective fears, other practical reasons exist as to why Arab and Muslim aliens might feel compelled to acquiesce to the government's request for an interview. Some persons targeted for interviews had violated immigration restrictions or had expired visas.[127] The interviewees were not given *Miranda* warnings, because the Justice Department adamantly maintained that the interviews were not custodial interrogations.[128] Is it reasonable, however, for an alien who has violated United States immigration laws to believe he has the right to decline the government's request for an interview?[129] The government's refusal to articulate the consequences of declining an interview did not inspire confidence that such a person would remain unscathed. Although the Department repeatedly asserted that the interviews were voluntary, it never clarified what would happen if an alien refused to meet with police officials or if an alien exercised his Fifth Amendment right to remain silent during questioning. Moreover, how would an individual know he even had a right to

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[125] Danny Hakim, *Inquiries Put Mideast Men in Spotlight*, N.Y. TIMES, Nov. 16, 2001, at B10.

[126] Mae Ghalwash, *Strangers in Their Own Country; Muslim Citizens May Not Agree with U.S. Policy but Love America*, HOU. CHRON., Dec. 16, 2001, at A.

[127] Attorney General's Guideline Memorandum, *supra* note 24.

[128] *Id.*

[129] In *Bostick*, the Court stated that the reasonable person test "presupposes an *innocent* person." 501 U.S. at 438.

remain silent if *Miranda* warnings were not given at the outset of the interview session?

These factors suggest that many, if not most, Arab aliens would have had difficulty refusing the federal government's request for a "voluntary" interview. Several weeks following the announcement of the interrogation sessions, President Bush stated that America was "at war" with foreign terrorists.[130] The President also asserted that foreign "guests" in our country should provide FBI agents with any information they might have about terrorists.[131] At the same time that the President was sending this message, top Justice Department officials acknowledged their aggressive efforts to locate terrorists in the United States.[132] Faced with such public admissions by the federal government and confronted with daily pressures of ethnic profiling and discrimination, it is highly unlikely that lawful resident aliens from Arab countries would have felt free to ignore a FBI request to talk about terrorism.[133] If most Americans feel compelled to talk to police officers during typical police encounters, why should we believe that resident aliens from Middle Eastern and Muslim countries would not have felt similarly compelled to talk with FBI agents about the events of September 11?

In the final analysis, few people sincerely believe that the Justice Department's interrogation program was truly "voluntary." Public statements by law enforcement officials were consistent with legal rules governing consensual police-citizen encounters. Moreover, press reports suggest that the procedures employed by FBI agents and other law enforcement officers during the interviews were consistent with controlling legal precedents. Thus, the Attorney General and other high-

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[130] Remarks to U.S. Attorneys Conference, 2001 Pub. Papers II, 1459, 1462 (Nov. 29, 2001).

[131] *Id.* at 1461.

[132] Attorney General John Ashcroft, Attorney General Ashcroft Announces Responsible Cooperators Program (Nov. 29, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_29.htm) (last accessed Feb. 27, 2004).

[133] *See generally* Matthew Brezezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES MAGAZINE, Oct. 27, 2002, § 6 (Magazine), at 50 (describing a seventy-three day detention in solitary confinement of an Egyptian, lawful resident alien).

ranking officials could confidently assert that the interrogation sessions did not violate any constitutional liberties.[134] The significant point, however, is that the constitutional standard the federal government relied upon is "a sham."[135] The "reasonable person" test remains a hoax because it was never intended to measure the reality of police-citizen encounters. For over two decades, the Court has taken the position that a person approached and questioned by police officials will feel free to disregard the officials, ignore their inquiries or terminate the encounter. This conclusion—originally stated in *United States v. Mendenhall*[136]—has never been supported by empirical evidence. Instead, the Court's judgment was a "prescriptive statement masquerading as a descriptive observation."[137] Since *Mendenhall*, the Court has adhered to the reasonable person standard and *Drayton* continues this misguided approach despite extensive academic criticism.[138] The Court's conclusion in *Drayton* that no seizure occurred was not supported by empirical data; in fact, empirical data suggests that most people would not feel free to terminate a police encounter under the circumstances described in *Drayton*.[139] When the Court de-

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[134] For example, George Tenet, Director of the CIA, told a reporter:

> [A]s the attorney general has noted in the last month, the FBI has conducted nearly 10,000 interviews with current and former Iraqi citizens residing here in the United States. All of these interviews were voluntary, and all were conducted within the strict confines of the Constitution. And they were conducted with the full respect to the rights and the dignity of those who were contacted by our agents.

Operation Iraqi Freedom (MSNBC television broadcast, Apr. 17, 2003).

[135] Nadler, *supra* note 104, at 214 (explaining that under "the current state of the law, the [Supreme] Court's stated definitions of seizure and voluntary search are a sham.").

[136] 446 U.S. 544, 555 (1980) (plurality opinion). Although the "reasonable person" test was announced by a plurality opinion in *Mendenhall*, a majority of the Court has reaffirmed that standard in subsequent cases. *See* Florida v. Bostick, 501 U.S. 429 (1991).

[137] James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 630 n.154 (1985).

[138] *See e.g.*, Stuntz, *supra* note 17; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 n.205 (1990) (listing academic criticism of the Court's analysis).

[139] *See* Nadler, *supra* note 104, at 165-93 (describing social science data on

cides that a bus passenger feels free to ignore or decline cooperation with a police officer who places his face within inches of the passenger, the Justices are simply "using only intuitive reflections o[f] their own experience and . . . the imagined experience of other citizens."[140]

The outcome of *Drayton* reaffirms that the Court is not interested in a realistic assessment of the voluntary nature of police-citizen encounters. Like earlier precedents, *Drayton* "lends itself to a rather chilling interpretation: that lower courts are expected not to interfere with bus sweep procedures."[141] If *Drayton* sends the message that the judiciary should not inject a dose of "reality" into the bus sweep scenario, it is fair to assume that the judiciary and other legal actors will exercise a jaundiced eye when assessing the constitutionality of the Justice Department interrogation sessions. If the *Drayton* majority could casually assert that "bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them,"[142] then federal judges will also be inclined to accept the claim that Arab resident aliens cooperated with FBI agents not because of coercion but because they believed that answering questions would enhance their own safety, as well as the nation's security against future terrorist attacks. Furthermore, since the threat of terrorism pervades the mindset of most

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related issues).

[140] *Id.* at 165.

[141] Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures*, 1991 U. ILL. L. REV. 729, 752 (1991).

[142] *Drayton*, 536 U.S. at 205. In his dissent, Justice Souter criticizes the majority's contention regarding the consent of travelers to baggage searches:

> Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to "enhanc[e] their own safety and the safety of those around them."

Id. at 208 (Souter, J., dissenting) (citation omitted).

Americans in the debate over law enforcement procedures, federal judges may be more sympathetic to the same government arguments that might have triggered skepticism from the judiciary prior to September 11.[143]

Under current legal norms, a challenge to the Justice Department's interrogation sessions will not succeed unless FBI agents employed drastic and oppressive measures to ensure compliance with their "requests" for "voluntary" interviews. FBI agents and other police officers, however, will rarely need to utilize such methods to achieve their objectives. To the average person, an agent's "request" is the equivalent of a legal command or order.[144] "For example, citizens generally do not interpret 'Can I please see your license and registration?' as spoken by a police officer as a genuine request; it is a command, and everyone understands this."[145] The tactics described in *Drayton* that might trigger Fourth Amendment scrutiny—physical force, intimidating movements, overwhelming show of authority, brandishing of weapons, blocking of exits, threats, commands or authoritative tones of voices—are not necessary for federal law enforcement.[146] Unless FBI agents

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[143] *Cf.* Nadler, *supra* note 104, at 221.

> It may be the case that, on balance, it is desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons, especially with the current need to be vigilant about potential risks of terrorism. In this way, it is understandable that the *Drayton* Court scrupulously avoided announcing rules in drug cases that would restrict the ability of police to investigate terrorism and other serious threats to public security.

Id.

[144] *See* Nadler, *supra* note 104, at 188 ("Because authorities such as police officers direct the actions of others, the listener is likely to conclude that an utterance is in fact a directive, or an order to be followed." (footnote omitted)).

[145] *Id.*

[146] Relying on social science studies, Professor Nadler also observes that:

> [A]uthority figures do not need to employ highly face-threatening language to achieve their goal. In fact, a polite request is usually perceived by the listener as being face-maintaining because the listener understands that coercion may be used. Thus, a police officer who says, "Do you mind if I search your bags?" is perceived as being more face-sensitive than one who says, "I am going to search your bags"; at the same time, the listener in both situations realizes he or she must comply with the message. Thus, because a police officer is perceived as an authority, he need not rely on

employed the severe methods seen in *Kaupp*—removing a person from his home or location, transporting him to the police station and subjecting the person to an interrogation or other investigative procedure—a Fourth Amendment challenge to the Justice Department's interrogation sessions will not succeed. Therefore, unless an Arab resident alien was subjected to the functional equivalent of an arrest, constitutional jurisprudence will consider his decision to participate in an interview with FBI agents to have been consensual.

PART II: PROFILING AIRLINE PASSENGERS

The second example of law enforcement's use of ethnicity is not yet the law, nor is it a *de facto* policy acknowledged by government officials. Instead, it is a proposal advocated by Stuart Taylor, Charles Krauthammer and others[147] that airport security officials select passengers—presumably citizens and non-citizens alike—on the basis of national origin for additional security. Stuart Taylor, for example, calls for a "well-designed profiling system" that "would factor in suspicious behavior, along with national origin, gender, and age. It could spread the burden by selecting at least one white (or black, or Asian) passenger to be searched for every Middle Easterner so selected."[148] According to Taylor, the "only real protection

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> coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power . . . . Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun.

Id. at 188-89 (footnotes omitted).

[147] *See* Alschuler, *supra* note 1, at 227 n.253 (citing sources). In August 2002, the head of the Transportation Security Administration, James M. Loy, was reported to have said that profiling airline passengers "whose behavior or background raise red flags, should be seriously considered." Mac Daniel, *Loy Sees Potential for Profiling*, BOSTON GLOBE, Aug. 6, 2002, at B4.

[148] Taylor, *supra* note 6. Taylor begins his proposal with an emotional appeal to our survival instincts:

> What would happen if another 19 well-trained Al Qaeda terrorists, this time with 19 bombs in their bags, tried to board 19 airliners over the next 19 months? Many would probably succeed, blowing up lots of planes and thousands of people, if the forces of head-in-the sand political correct-

[against future terrorism in the sky] is to make national origin a key factor in choosing [which] bags [to search]."[149] Taylor denies that he is suggesting that all Middle Easterners are terrorists. "The logic of profiling is to identify for more-careful screening those small groups who, based on historical experience, *seem more likely than others* to include suicide bombers (or just bombers). History tells us that all 19 of the September 11 suicide bombers, and most or all other terrorists known to have murdered planeloads of people, have been Middle Eastern men."[150]

Anticipating constitutional and political objections that American citizens could not or should not be subjected to explicit ethnic-based searches, Taylor confidently claims that "[m]illions of Arab-Americans would not fit the profile because their American roots would be apparent—from their accents and speech patterns—to trained security screeners."[151] Taylor also asserts there is a logical stopping point to his proposal. He contends that racial profiling of blacks and Hispanics on the highways is not cost-effective.[152] "Stopping people for 'driving

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> ness prevail—as they did before September 11—in blocking use of national origin as a factor in deciding which passengers' bag to search with extra care.

Id.

[149] *Id.*

[150] *Id.* (emphasis added).

[151] *Id.* In an earlier column, Taylor proposed targeting "Arab-looking people" at the nation's airports for extra searches and screening. *See* Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, NAT'L J., Sept. 22, 2001, *available at* http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm (last visited Feb. 27, 2004). In that proposal, Taylor asserted that ethnic profiling of Arabs at airports satisfied constitutional norms:

> [T]he mathematical probability that a randomly chosen Arab passenger might attempt to a mass-murder-suicide hijacking—while tiny—is considerably higher than the probability that a randomly chosen white, black, Hispanic, or Asian passenger might do the same. In constitutional-law parlance, while racial profiling may be presumptively unconstitutional, that presumption is overcome in the case of airline passengers, because the government has a compelling interest in preventing mass-murder-suicide hijackings, and because close scrutiny of Arab-looking people is narrowly tailored to protect that interest.

Id.

[152] Taylor, *supra* note 6. Of course, not everyone agrees with Taylor that racial

while Arab' would be similarly unwarranted. [However,] [f]lying while Middle Eastern poses a dramatically different cost-benefit calculus."[153]

Similarly, Charles Krauthammer agrees with Taylor that searching the bags of little old ladies is nothing more than "political correctness."[154] Krauthammer concedes that no system will catch every terrorist, however, he contends that America's current airport security system "is designed to catch no one because we are spending 90% of our time scrutinizing people everyone knows are no threat."[155] Finally, Krauthammer asserts that "We all would rather not make any calculations based on ethnicity, religion, gender or physical characteristics—except that on airplanes our lives are at stake."[156]

Taylor, Krauthammer and many legal scholars offer blunt,

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profiling of blacks on the highways is not cost-effective. *See, e.g.,* Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 53-57 (comments of police officials on why officers profile); Dan Herbeck, *Transit-Site Drug Arrests Spur Racism Allegations*, BUFFALO NEWS, Jan. 30, 1994, at 1 (quoting Depew, New York Police Chief John Maccarone: "'We're dealing with either blacks, Hispanics, Dominicans or Haitians. These are the couriers. We lean on them heavily here. . . . Unfortunately, that's who the couriers are . . . I don't believe it's unfair. We have to do everything we can do to stop drugs from coming in. The honest, upright citizen—black or white—knows that what we are doing is fair."); *cf.* Jodi Wilgoren, *Police Profiling Debate Hinges on Issue of Experience of U.S. Bias*, N.Y. TIMES, Apr. 9, 1999, at B7 (quoting former New York City police commissioner William J. Bratton: "'Cops are profiling all the time, your good cops; unfortunately, now that's developing a bad name . . . . Whether they call it profiling, or street smarts, awareness—whatever the names might be—profiling is essential.").

[153] Taylor, *supra* note 6.

[154] Krauthammer, *supra* note 6.

[155] *Id.*

[156] *Id.* Krauthammer closes his essay with an emotional, yet practical, appeal to common sense and public safety:

> Airport security is not permitted to "racially" profile, but every passenger—white or black, male or female, Muslim or Christian—does. We scan the waiting room, scrutinizing other passengers not just for nervousness and shiftiness but also for the demographic characteristics of al-Qaeda. We do it privately. We do it quietly. But we do it. Airport officials, however, may not. This is crazy. So crazy that it is only a matter of time before the public finally demands that our first priority be real security, not political appearances—and puts an end to this charade.

Id.

gut-wrenching and practical arguments as to why airport security officials should be permitted to "profile" individuals of Arab ancestry.[157] The terrorists of September 11 were all young Middle Eastern men who killed many innocent people. Government officials warn of future terrorist attacks, and our survival instincts tell us that the government's prediction that the next round of terrorism will come from a Middle Eastern nation is probably correct.[158] Although Taylor and Krauthammer's arguments may appeal to our common sense and understandable desire for greater national security, I am still inclined to reject their proposals for the following reasons.

First, Taylor and Krauthammer's assessment of current airline security policies, which require the searching of everyone's luggage, as "political correctness," falsely characterizes the constitutional issue at stake. The requirement that airport officials search all luggage directly promotes values central to the Fourth Amendment.[159] A system that requires

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[157] *See* Malti-Douglas, *supra* note 6 ("Arab-Americans like me want to be safe when we fly. Cooperating with security procedures, even when we suspect that we are getting more attention than our fellow citizens, makes sense. Does anyone really want a security official to hesitate before stopping a suspicious passenger out of fear of an accusation of bias?"). *Cf.* Stuntz, *supra* note 115, at 2179. Professor Stunts asserts that "racial and ethnic profiling is a fact of life that the legal system probably cannot change." Moreover, Stuntz doubts that "an optimal regime" would bar racial profiling. *Id.* He explains, "The inefficiency of treating all airplane travelers the same—should airport security officials really regard travels with Danish visas and travelers with Yemeni visas as equally risky?—is both great and obvious. Reasonable people can differ about the balance, but one could plausibly conclude that the efficiency gains from profiling outweigh the harm from the ethnic tax that post-September 11 policing is imposing on young men of Middle Eastern origin." *Id.* For a thoughtful and persuasive reply to Stuntz's commentary on racial and ethnic profiling in a post-September 11 world, see Davies, *supra* note 1, at 81-94.

[158] "Sometimes the information [on potential terrorists] is very general—vague talk, bragging about future attacks. Sometimes the information is more specific, as in a recent case when an al Qaeda detainee said attacks were planned against financial institutions . . . . [W]e now know that thousands of trained killers are plotting to attack us, and this terrible knowledge requires us to act differently." *Overriding and Urgent Mission for New Agency*, WASH. POST, June 7, 2002, at A19 (containing transcript of President George W. Bush's speech on homeland security delivered June 6, 2002).

[159] *Cf.* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) ("To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a

universal examination of luggage (or individuals) forces airport officials to be neutral, which protects the rights of all citizens under the Fourth Amendment. Under such a system, particular passengers are not subject to search based on "'the discretion of the official in the field.'"[160] By following neutral rules that apply to everyone, officials are not given the discretion to arbitrarily select Arab or Muslim passengers for search or detention.[161] As Professor Alschuler has observed, "[b]urden sharing demonstrates to people of Arab ethnicity and others that the hassles to which they are subjected do not flow from suspicion of their appearance or other invidious motives."[162]

Second, I do not see a principled basis for limiting ethnic-based intrusions to the nation's airports.[163] A biological or chemical weapons attack at a major sporting event—for exam-

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particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.").

[160] LAFAVE, *supra* note 104, § 10.6(c), at 632 (quoting United States v. Davis, 482 F.2d 893 (9th Cir. 1973)). As Professor LaFave observes, under a system that requires universal screening of all passengers, "all citizens who wish to use the [airport] are subject to the same screening procedures," and they do not encounter "social stigma . . . public ridicule or suspicion." *Id.* at § 10.6(e) at 639 (quoting People v. Hyde, 524 P.2d 830, 843 (Cal. 1974)). *Cf.* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994) ("A broader search is sometimes better—fairer, more regular, more constitutionally reasonable—if it reduces the opportunities for official arbitrariness, discretion, and discrimination . . . . The broader, more evenhanded search is sometimes more constitutionally reasonable even if the probabilities are lower for each citizen searched." (footnote omitted)).

[161] *See* Delaware v. Prouse, 440 U.S. 648, 655 (1979) (invalidating random stops of automobiles for purpose of checking license and registration because, *inter alia*, random stops pose a risk that officers will abuse their discretion).

[162] Alschuler, *supra* note 1, at 230.

[163] In his earlier article, Stuart Taylor acknowledged the threats and "dangers of terrorists smuggling bombs or guns or box cutters onto buses or trains or subways or bridges, or into tunnels or crowded stadiums or office buildings or schools or the Capitol or Disneyland." Taylor, *supra* note 151. While conceding that these "dangers are real," Taylor speculates that "in such settings, [the dangers] are as likely to be presented by domestic terrorists such as Timothy McVeigh as by people of Arab descent." *Id.* Taylor wants us to believe that Arab terrorists will insist on using airplanes to commit future acts of terrorism. "Only by crashing airliners can terrorists commit mass murder with weapons as easily concealed as box cutters and plastic knives. And only would-be mass murderers bent on suicide—the vast majority of them extremist Islamic fanatics craving martyrdom—would crash an airliner." *Id.*

ple, at a future Egg Bowl between the Ole Miss Rebels and Mississippi State,[164] at a University of Tennessee football game in Knoxville[165] or at the Superbowl[166] could kill many more innocent people than the approximately 3,000 that died on September 11.[167] If the nation intends to make a serious commitment to prevent future terrorism, the logic of Taylor and Krauthammer suggests that government officials should target Middle Eastern and Muslim men in and around any event or activity with extraordinarily large groups of individuals. The release of a biological or chemical agent in the middle of Times Square could also kill thousands of people.[168] To prevent or reduce the chances of such a horrific attack, should police officers stop and search all Middle Eastern men in and around Times Square on New Year's Eve?[169] Likewise, should police officials stop and search all Middle Eastern men in and around the federal buildings and historic landmarks in Washington, D.C.?

Consider the damage to both people and infrastructure if a bomb or biological weapon detonated on one of the bridges or tunnels leading into New York City. Applying Stuart Taylor's

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[164] Attendance of 60,245 at the Egg Bowl game between the University of Mississippi and Mississippi State University on November 28, 2002, was the largest for an on-campus game in the 99-year history of the series and the fourth-largest ever at the time. Rusty Hampton, *Bowl-Bound Rebs Finish Strong, Dump Dogs 24-12*, CLARION-LEDGER (Jackson, MS), Nov. 29, 2002, at A1.

[165] The attendance record for Neyland Stadium, home to University of Tennessee football, is 108,768, which was set in 2000 against Florida. *SEC Report,* THE ARKANSAS DEMOCRAT-GAZETTE (Little Rock, AR), Sept. 4, 2003, at 28.

[166] The attendance record for the Super Bowl is 103,985, which was set at Super Bowl XIV at the Rose Bowl in Pasadena, California, in 1980. *Super Bowl Facts and Figures*, VENTURA COUNTY STAR, Jan. 23, 2001, at C2.

[167] Because of the attacks on September 11, 2001, of the World Trade Center site in New York City, 2,792 people died. *Nation in Brief*, WASH. POST, Mar. 14, 2003, at A28. Additionally, forty victims died during the plane crash in Shanksville, Pennsylvania. Phil Hirschkorn, *New York Adjusts Death Toll Downward*, *available at* http://www.cnn.com/2002/US/08/22/911.toll/index.html (Aug. 22, 2002). At the Pentagon, 184 victims died during the September 11 attack. *Id.*

[168] *See generally* Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417 (2001).

[169] Over 750,000 revelers attended the 2002-2003 New Year's Eve celebration in Times Square of New York City. *Party's Over, Cleanup Begins*, ATLANTA J.-CONST., Jan. 2, 2003, at A8.

"cost-benefit" analysis, many individuals might favor stopping and searching the vehicles of all Middle Easterners to prevent such an attack. A biological or chemical attack on New York or Chicago's subway system would also cause enormous damage.[170] Why not, on random days or during a high-security alert period, separate Middle Easterners from other passengers for extra screening at all subway entry points? According to the "cost-benefit" analysis advocated by Stuart Taylor, detaining and searching individuals "driving while Arab" "commuting while Arab" or even "vacationing while Arab" is a sound policy if the nation wants to take maximum steps to protect itself against the next round of terrorist attacks.

The attack on Pearl Harbor on December 7, 1941, also caused enormous death and destruction.[171] In the aftermath of that tragedy, government officials, including the President of the United States, initiated a horrid race-based policy of detaining, searching and eventually forcibly removing and transporting thousands of Japanese aliens and Japanese-American citizens from their homes on the West Coast to prison barracks surrounded by barbed wire and armed guards who shot at and, in some cases, killed individuals who tried to escape.[172] In the most disgraceful decisions rendered by the Court since *Dred Scott v. Sandford*,[173] the Court sustained these racist poli-

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[170] In Japan, a sarin gas attack in the Tokyo subway system killed twelve people and left 5500 people ill. *See* Jun Sato Yomiuri Shimtun, *Sarin Cleanup Remembered*, THE DAILY YOMIURI (Tokyo), Mar. 17, 2003, at 3 (reflecting on the attack during its eight-year anniversary).

[171] In the attack on Pearl Harbor, 2,390 Americans died. Scott Fornek, *Bush: We Have Seen First War of Century*, CHI. SUN-TIMES, Oct. 4, 2001, Extra Edition at New Special Edition 2.

[172] *See generally* ROBINSON, *supra* note 29; *see also* Muller, *supra* note 38, at 577-78. Professor Muller notes that the federal government "chose to ditch the Fourth Amendment entirely in framing its search-and-seizure program" regarding Japanese Americans and Japanese aliens in the aftermath of Pearl Harbor. *Id.* at 577. Muller also observes that by the autumn of 1942, the federal government had transported both Japanese Americans and Japanese aliens by train to permanent camps in the Mountain West. "The euphemism for these facilities was 'relocation centers,' but everyone called them concentration camps. [Individuals of Japanese ancestry] lived with neither comfort nor privacy in tarpaper barracks, surrounded by barbed wire and guarded by U.S. Army sentries in guard towers around the perimeter." *Id.* at 578.

[173] 60 U.S. 393 (1856).

cies.[174] *Hirabayashi v. United States*[175] upheld the conviction of an American citizen who violated a curfew order that applied to all persons of Japanese ancestry living in certain areas of the West Coast. Although *Hirabayashi* may have been intended as a narrow ruling,[176] one year later in *Korematsu v. United States*,[177] the Court upheld the conviction of another American citizen for violating an exclusion order that applied only to individuals of Japanese ancestry. Speaking for a majority of the Court, Justice Black insisted that Korematsu was excluded not because of racial prejudice, but because the country was at war with the government of Japan.[178] Deferring to military authorities, Justice Black further explained that military officials feared an invasion of the West Coast and had decided that military urgency "demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily."[179] Justice Black asserted that there was "evidence of disloyalty on the part of some," and that military officials felt "the need for action was great" and the "time was short."[180]

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[174] *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Professor Muller has fittingly observed that:

> [T]he Court has not overruled *Korematsu* primarily because it has not needed to. But more importantly, to the extent that *Korematsu* stands at all today, it stands as a deeply discredited decision. Eight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing *Korematsu* as an error—even as spectacular an error as the Court's *Dred Scott* decision.

Muller, *supra* note 38, at 586 (footnotes omitted).

[175] 320 U.S. 81 (1943).

[176] Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 465-67 (explaining how Court in *Hirabayashi* wanted to decide the constitutionality of the curfew order on narrow grounds).

[177] 323 U.S. 214 (1994). On the same day *Korematsu* was decided, the Court also decided *Ex Parte Endo*, 323 U.S. 283 (1944). *Ex Parte Endo* ruled that the petitioner, an American citizen, was entitled to release from a government detention program that was established by the War Relocation Authority. *Ex Parte Endo* was decided on statutory grounds; the Court did not reach the constitutionality of holding detaining persons of Japanese ancestry. *Id.* at 299. For excellent legal critiques of the cases, see PETER IRONS, JUSTICE AT WAR (1983); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

[178] *Korematsu*, 323 U.S. at 223.

[179] *Id.*

[180] *Id.* at 223-24.

While Justice Black insisted that the government's race-based exclusion order was not generated by racial or ethnic hostility, there were good reasons to doubt this conclusion. Even a cursory review of the events and evidence available to the Court in 1944 revealed that racial bias permeated the government's actions toward individuals of Japanese ancestry. For example, prior to the attack on Pearl Harbor, President Roosevelt had already received reports confirming the loyalty of Japanese American citizens on the West Coast.[181] After the attack, however, high-ranking government officials (and eventually President Roosevelt) rejected loyalty hearings for people of Japanese ancestry because it was impossible to determine loyal Japanese from disloyal ones.[182] Similar discriminatory treatment was evident when

> military authorities imposed dusk-to-dawn curfews on American citizens of Japanese ancestry living in a wide swath of territory along the West Coast, and also forbade them from traveling more than five miles from their homes without permission. No such restrictions were imposed on American citizens of German or Italian ancestry anywhere in the United States.[183]

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[181] ROBINSON, *supra* note 19, at 67-68. Prior to war with Japan, President Roosevelt:

> had received FBI reports about the nature of the local Japanese community in Hawaii, and he had his own secret intelligence network report on the loyalty of West Coast Japanese Americans. He was again assured by the FBI and his special investigators after Pearl Harbor that Japanese Americans were loyal and that there was no evidence of sabotage in Hawaii. However, he chose not to accept such findings.

Id. at 114.

[182] *Id.* at 120 ("[President] Roosevelt's words and actions both before and after Pearl Harbor, when taken in their entirety, point to his acceptance of the idea that Japanese Americans, whether citizens or longtime resident aliens, were still Japanese at the core. He regarded them as presumptively dangerous and disloyal on racial grounds."); *id.* at 161 (noting different approach of Roosevelt Administration regarding loyalty hearings for German and Italian *aliens* on East Coast and its approach to loyalty hearings for Japanese American *citizens*: military officials on West Coast rejected hearings for Japanese Americans because "[n]ot only would such hearings be too time-consuming but, as one military lawyer stated, they would undermine the basis of the evacuation—that is was impossible to distinguish between loyal and disloyal Japanese Americans").

[183] Muller, *supra* note 38, at 577.

Along the same lines, President Roosevelt rejected a military request to remove West Coast Italian and German aliens en masse, and he specifically refused to permit any evacuation of Italian or German aliens living on the East Coast despite the greater number of submarine sinkings on the East Coast than the West Coast.[184] On January 31, 1944, eleven months *before* the Court decided *Korematsu*, the army re-instituted selective service on Japanese Americans.[185] At the same time the army was drafting some Japanese Americans to fight in the war, military officials were also ordering the imprisonment of other Japanese American citizens in concentration camps.[186] Finally, the military commander responsible for implementing the exclusion order revealed the most persuasive evidence available to support the contention that the exclusion order in *Korematsu* was based on racial antagonism. On April 13, 1943, Lieutenant General John L. DeWitt told Congress the following:

> I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. . . . It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . .[187]

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[184] ROBINSON, *supra* note 19, at 111-12.

[185] *Id.* at 209.

[186] *Id.*

[187] *Korematsu*, 323 U.S. at 236 n.2 (Murphy, J., dissenting) (quoting *Hearing Before the House Naval Affairs Subcommittee to Investigate Congested Areas*, 78th Cong. 739-40 (1943) (testimony of Lt. Gen. John L. DeWitt)). Although Justice Murphy does not include General DeWitt's other comments in his dissent, General DeWitt's testimony to Congress also included the following statement, which was made available to the Court: "A Jap is a Jap. It makes no difference whether he is an American citizen or not." Brief of Amicus Curiae Japanese Americans Citizens League at 198, Korematsu v. United States, 323 U.S. 214 (1944), *reprinted in* 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 309-530 (Philip B. Kurland & Gerhard Casper eds., 1975). *See also* Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 288 ("General John L. DeWitt, the West Coast military commander, was a racist who simply assumed, without evi-

I fully recognize that *up until now*, most Arab Americans and lawful resident aliens from Arab and Muslim countries have not been subjected to the same scale of human rights abuses that our government imposed on Japanese aliens and Japanese Americans in the 1940s.[188] A plausible argument

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dence, that Japanese Americans posed a threat of sabotage and espionage."). History would reveal that government officials deliberately manipulated the evidence that was given to the Supreme Court. *See* Korematsu v. United States, 584 F. Supp. 1406, 1417-19 (N.D. Cal. 1994). For example, in the original version of his *Final Report* on the evacuation and exclusion of Japanese persons from the West Coast, General DeWitt explained that his racially-based implementation of the exclusion order was "because it was impossible to distinguish loyal from disloyal Japanese Americans and that lack of time for hearings had not been a factor in his decision." ROBINSON, *supra* note 19, at 184-85. After Assistant Secretary of War John McCloy received General DeWitt's report, he ordered all copies of the report be "destroyed, and he forced DeWitt to write a revised version adopting the more defensible position" on the justifications for the exclusion order. *Id.* at 185. For a detailed discussion on how high-ranking government officials manipulated the publication and release of DeWitt's report, with an eye toward influencing the results in the Japanese internment cases, see IRONS, *supra* note 177, at 206-18.

[188] *See* Muller, *supra* note 38, at 581 (acknowledging "very real indignities, and in some cases the very real terror and violence, that Arab and Muslim Americans have actually endured. . . . But the fact is that the past five months [since September 11, 2001] do not match the scale of the civil rights tragedy that followed Pearl Harbor."). While there has not been the type of wide-scale civil liberties abuse against the *entire* Arab-American or Arab-alien communities, there has been deliberate effort to target aliens from Arab and Muslim countries, and there have been many abuses of civil liberties against individuals from Arab and Muslim nations. *See generally* COLE, *supra* note 5. Relying on government records, Professor Cole reports that as of May 2003, approximately 5,000 persons from Arab and Muslim nations had been permanently detained by the federal government. Professor Cole observes that of the more than 5000 people detained,

> not one has been charged with any involvement in the crimes of September 11. The only person actually charged with the September 11 attacks, Zacarias Moussaoui, was arrested before September 11, and therefore is not part of the roundup. Only five detainees (three noncitizens from the initial wave and two citizens picked up later as material witnesses) have been charged with any terrorist-related crime. Of those five, one has been convicted of conspiracy to support terrorism; two were acquitted on all terrorism charges; the government dropped all terrorism charges against the fourth when he pleaded guilty to a minor infraction; and the fifth is awaiting trial. . . . Thus, by the government's own account, nearly all the thousands it has detained in the war on terrorism have turned out to have nothing to do with terrorism.

Id. at 25-26 (footnote omitted); *see also* Brzezinski, *supra* note 133 (describing sev-

can be made that the Bush administration "has not seen fit to lead with extreme assertions" in the aftermath of September 11.[189]

Moreover, reasonable persons can debate whether the federal government "has proceeded from a *premise* of moderation, and has not had to be forced to that position by the pressure of public protest."[190] However, if government officials authorize the detention and search of Middle Eastern men based on ethnicity, they act under the same premise that motivated the detention of Japanese Americans and aliens and defy the same constitutional principle that was violated in the 1940s. As one historian of the Japanese internment era noted, "Japanese Americans were singled out from other 'enemy' groups such as Italian Americans and German Americans as innately untrustworthy on racial grounds."[191]

If government officials implement Taylor and Krauthammer's proposal to target people of Arab ancestry for search and seizure at the nation's airports, the nation should be candid about our actions. These tactics stem from a belief that young Middle Eastern men will perpetrate future terrorist attacks on our country. To prevent future attacks, therefore,

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enty-three day detention of Egyptian alien). *See also* Davies, *supra* note 1, at 49-50 ("Despite the government assurances, however, fear for the rights of Arab-Americans grew as the soothing words of these public officials began to collide with information that federal agents had in fact begun to round up persons of Middle-Eastern descent and place them under arrest. In a little over a month, the number of people taken into federal custody mushroomed from dozens, to hundreds, to over one thousand." (footnotes omitted)). Davies notes that Middle Eastern descent was the "most common denominator among those arrested or subjected to questioning." *Id.* at 50 n.24.

[189] Muller, *supra* note 38, at 591. Professor Muller notes:

> In the terror and panic of mid-September, the administration might have proposed all manner of restrictions on aliens from Arab and Muslim countries, or even on American citizens of Arab ancestry or Muslim faith. The mind boggles at the possibilities: prohibitions on piloting or traveling on airplanes, bans on crossing bridges or entering skyscrapers, residential curfews, forced relocation or deportation, wholesale detention and interrogation of all aliens from particular nations.

Id.

[190] *Id.*

[191] ROBINSON, *supra* note 19, at 3.

airport security officials should detain and search *all* Middle Eastern men or those who appear to be Middle Eastern, Arab, or Muslim. The bottom line is that Middle Easterners and Arabs cannot be trusted. These persons are a threat to our safety not because of legitimate evidence of ties to terrorist networks or a particularized suspicion that an individual poses a threat as a terrorist but solely because of their nationality.

The government's internment of Japanese Americans in the 1940s stemmed from a similar logic. The Germans and Italians did not attack Pearl Harbor, the nation of Japan did. Some government officials genuinely feared that the Japanese would follow with an attack on the West Coast. It was imperative that the government take steps to eliminate or diminish the enemy's opportunities for future attacks. Federal officials believed that Japanese aliens and Japanese Americans were the logical source of assistance to the nation of Japan. After all, Japan had attacked Pearl Harbor. Therefore, government officials erroneously assumed, and the Court subsequently affirmed, that persons of Japanese ancestry in this country—to paraphrase Stuart Taylor's words—"seem much more likely than others"[192] to assist in future attacks.

This method of assessing potential threats to national security was wrong in the 1940s, and it is wrong today. More importantly, it violates constitutional principles embodied in the Fourth Amendment. The Fourth Amendment guarantees everyone a right to be free from unreasonable searches and seizures. When the government subjects individuals to search and seizure based on their national origin rather than objective, incriminating evidence, the government acts unreasonably.[193] If our government continues to authorize interroga-

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[192] Taylor, *supra* note 6. As Eugene Rostow has noted, in *Korematsu* the Court "solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society." Rostow, *supra* note 177, at 504.

[193] In recent years, there has been an enormous (and enlightening) amount of legal scholarship explaining why racial and ethnic factors should not play a role in an officer's decision to seize or search a person. *See, e.g.,* HARRIS, *supra* note 10; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Harris, *supra* note 17; David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and*

tions, and eventually orders searches and seizures, based on Arab or Middle Eastern ancestry, many persons of Arab descent will adopt the attitude of many black Americans who believe that the Fourth Amendment rarely protects them from arbitrary and selective law enforcement tactics. Blacks typically perceive their status vis-à-vis the police as a "second-class" citizenship.[194] If this happens to Arab Americans or legal aliens of Arab descent, our nation may feel slightly safer, but our constitutional freedoms will pay the price.

CONCLUSION

The horrible events of September 11, 2001 have confronted the nation with many difficult issues. This essay discussed two situations regarding the use of ethnicity to investigate and prevent future terrorism. The Bush Administration's decision to interview 5000 Arab aliens living in the United States was ethnic profiling. Although the selection process relied primarily on ethnicity, administration officials had legal support for their procedures. Regrettably, the Supreme Court's Fourth Amendment jurisprudence has tolerated racial and ethnic profiling by law enforcement officials, and it is unlikely that any judge would find that the "voluntary" interviews constituted seizures under the Constitution.

In contrast to Bush Administration officials, Stuart Taylor and Charles Krauthammer candidly admit that their proposal for searching Middle Eastern men at the nation's airports is focused on ethnicity, pure and simple. In Taylor's words, Arab and other Middle Eastern males should be targeted for search because, "based on historical experience, [they] seem more likely than others to include suicide bombers (or just bombers)."[195] Taylor and Krauthammer's proposal should be resist-

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Frisked, 69 IND. L.J. 659 (1994); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

[194] As *New York Times* editorial writer Brent Staples puts it: "With reason, African-Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way." Brent Staples, *Editorial Notebook: Growing Up to Fear the Law*, N.Y. TIMES, Mar. 28, 1991, at A24.

[195] Taylor, *supra* note 6.

ed for many reasons, not the least of which is that it undermines a central value of the Fourth Amendment: deterring the discretion of officers in the field. Although they denied it, Taylor and Krauthammer's proposal also has no limiting principle; if the goal of ethnic profiling in airports is to save as many lives as possible, then their proposal should extend to major entertainment events, other public transportation facilities and any venue in which large numbers of people congregate.

Although many reasonable persons might resist the charge, this essay has endeavored to show that the Bush Administration's interviews of Middle Eastern aliens, and Taylor and Krauthammer's proposal for ethnic profiling in airports, proceed along the same premise that motivated the detention of Japanese Americans and aliens in the 1940s. Just as persons of Japanese ancestry were deemed untrustworthy after the Pearl Harbor attack, young men of Middle Eastern and Arab ancestry are presumed untrustworthy today. In my view, ethnic profiling was wrong then, and it is wrong now.

TERRORISM, RACE AND A NEW APPROACH TO CONSENT SEARCHES

George C. Thomas III[*]

Much of the talk in the press and on television about racial profiling is ideologically charged and simplistic. No one has a comprehensive definition of "racial profiling," and it is often not clear what is being condemned. Is it always morally offensive and unconstitutional to use race when it is relevant to the probabilities of arresting the right person? I think the answer is no. We should not, for example, require police to ignore race when the victim has identified the race of the man who robbed her. Even if we thought this a good idea, it would be an unenforceable edict. Police would take race into account in that case and seek a way to predicate the stop or arrest on some other ground.

Of course, race or ethnicity can be used to "profile" suspects in much more pernicious ways. To use race or ethnicity as the basis for making routine stops or searches is morally offensive and should constitute a violation of the Constitution. In *Whren v. United States*,[1] the Supreme Court unanimously held that the Fourth Amendment is not offended if the police choose to make a traffic stop because of the driver's race.[2] As long as the police have probable cause to make the stop, the Court held, their motive is irrelevant.[3] The

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[1] 517 U.S. 806 (1996).

[2] *Whren*, 517 U.S. at 813.

[3] *Id.* at 817-19.

Court suggested that the constitutional protection against bad police motives lies in the Equal Protection Clause.[4] As others have concluded, it will be almost impossible to prove an equal protection violation in the shadowy world of police stops, frisks and searches.[5] Thus, we need a different approach to discourage police from acting on bad motives. Unlike some,[6] I accept *Whren*'s conclusion that motive by itself does not violate the Fourth Amendment. Looking for another solution, the second part of this paper will offer a change in Fourth Amendment doctrine that will, as a practical matter, make it much more difficult for police to "hide" bad motives and much less likely that police can use race in an impermissible way.

In sum, uses of race or characteristics roughly linked to race can be relevant and constitutional. Other uses of race are both offensive and unconstitutional. The first part of this paper will sketch a narrow category in which the use of race in creating a profile might be appropriate. I stress "might be appropriate." Any reliance on race to support inferences about people recalls our sordid history of slavery, Jim Crow laws and repression of racial minorities. A poignant example of this repression can be found in James Patterson's book, Brown v. Board of Education*: A Civil Rights Milestone and Its Troubled Legacy*.[7] In 1949, George McLaurin, a sixty-eight-year-old black educator, sought admission to the doctorate program at the all-white University of Oklahoma:

> The state reluctantly admitted him . . . but forced him to remain in an anteroom off the regular classrooms where course work was given. In the library he was made to sit at a segregated desk behind a pile of newspapers in the mezzanine. In the cafeteria he had to eat in a dingy alcove by himself and at a different hour from the whites.[8]

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[4] *Id.* at 813.

[5] *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326-27.

[6] *See id.* at 329.

[7] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 17 (2001).

[8] *See id.* at 17, 19 (illustrating McLaurin's segregated anteroom).

Integration, as understood by the University of Oklahoma in 1949, relieved white students of the obligation of coming in close contact with Mr. McLaurin, even of seeing him in the dining hall or the library.[9] The destructive power of racial intolerance cannot be exaggerated.

The insidious intolerance that lurks when we use race to identify or predict behavior requires a strong presumption against those uses of race. But, as illustrated earlier, that presumption can sometimes be rebutted, as in the use of race in the description of a suspect. David Harris draws a distinction between the use of race to describe, versus the use of race to predict, future behavior. It is the latter, he argues with force, that is always offensive and always unconstitutional.[10]

Perhaps. It will be much more difficult to overcome the strong presumption of unconstitutionality in the predictive use of race. I am unsure that the presumption *can* be rebutted. But I will sketch the strongest argument in favor of a limited use of race to make predictions and let you decide whether David Harris is right that a predictive use is always wrong. I will then argue for a change in Fourth Amendment law that would make racial profiling more difficult to accomplish in the routine, run-of-the-mill cases.

I.

I begin by asking whether Middle Eastern origin[11] can be

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[9] *Id.* at 17-19.

[10] David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423 (2003).

[11] I suppose one could argue that "Middle Eastern" or "Arab" is not a racial description, but I do not think that argument gets very far. The Supreme Court considers Hispanics to be a minority for purposes of equal protection analysis even though Hispanics are considered white for purposes of the census. *Compare* Hernandez v. New York, 500 U.S. 352, 358-60 (1991), *with* Introduction to Census 2000 Data Products, U.S. Census Bureau (showing race and "Hispanic or Latino origin" as different categories), *at* http://www.census.gov/prod/2001pubs/mso-01icdp.pdf. The evil in racial profiling is not limited to technical definitions of race. Indeed, profiling hippies or bikers or gays is offensive and has nothing to do with race at all. Moreover, most scientists conclude that race is an artificial con-

used to create a "terrorist profile." As this is a thought experiment and not proposed legislation, I offer no specific definition of "terrorist." For purposes of this paper, I will assume that a "terrorist" is a member of al Qaeda or any other group that has sworn our destruction. Can this use of race be squared with the Constitution?

The Fourth Amendment has very specific requirements about the issuance of warrants and, beyond that, a vague observation that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[12] Thomas Davies has concluded that "unreasonable" meant something quite different to the Framers than it does to us today.[13] Today, it has a relativistic meaning—roughly, conduct that is inappropriate in the particular circumstances.[14] One may act reasonably, under tort law, by driving eighty miles an hour to get a badly injured person to the hospital but not by driving eighty miles an hour on icy roads for the thrill of it.

The Framers, according to Davies, understood the term in a much more formal way. Lord Coke used it as a synonym for "unconstitutional." In the seventeenth and eighteenth centuries, "[t]o say that a statute was 'against reason' was to say that it violated basic principles of legality."[15] When James Otis argued against the writs of assistance in 1761, he cited, and probably quoted, an opinion by Lord Coke that used "against reason" to mean "so contrary to the principles of common law as to be 'void.'"[16] Davies concludes, "Because

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struct without scientific meaning. *See* Alessandra Stanley, *Television Review: Race as a Fiction Invented by the Ruling Classes*, N.Y. TIMES, May 17, 2003, at B9 (attributing this view to "some of the most respected scholars in the country"). All of this suggests that using Middle Eastern appearance as part of a "terrorist profile" is a type of racial profiling. Whether it violates the Fourth Amendment is, I will argue, a separate question.

[12] U.S. CONST. amend. IV.

[13] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

[14] *Id.* at 686.

[15] *Id.* at 688.

[16] *Id.* at 690 & n.409. Davies concludes that Otis would have quoted Coke's "against reason" language because Otis spoke for four hours. *Id.*

'unreasonable' was a pejorative synonym for gross illegality or unconstitutionality . . . the Framers would have understood 'unreasonable searches and seizures' as the pejorative label for searches or arrests made under that most illegal pretense of authority—general warrants."[17]

Thus, the original meaning of the Fourth Amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects, against [general warrants] shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[18]

So we search history in vain for a meaning of "unreasonable" that extends beyond the condemnation of general warrants.

But the Supreme Court has followed modern relativistic usage—as Thomas Clancy puts it, the Court's Fourth Amendment jurisprudence lacks "a principled analysis."[19] Lacking principles, the Court often balances the degree of intrusion against the need for the search. This balance underlies the *Terry v. Ohio*[20] stop and frisk doctrine and various iterations of the principle that administrative inspections can proceed without any suspicion at all.[21] The Court has told us, over and over, that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"[22] An example is *Maryland v. Wilson*,

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[17] *Id.* at 693.

[18] *Id.* at 557 (quoting U.S. CONST. amend. IV) (suggesting modifications according to Davies's historical evidence).

[19] Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 629 (1995).

[20] 392 U.S. 1 (1968).

[21] *Terry*, 392 U.S. at 19.

[22] Maryland v. Wilson, 519 U.S. 408, 411 (1997) (quoting *Terry*, 392 U.S. at 19); *see* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (noting "touchstone" of reasonableness concerning invasion of privacy); *see also* Ohio v. Robinette, 519 U.S. 33, 39 (1996) (noting "touchstone of the Fourth Amendment is reasonableness"); Florida v Jimeno, 500 U.S. 248, 250 (1991) (noting the "touchstone" of reasonableness).

where the Court held that the Fourth Amendment did not require police to have any level of suspicion before ordering passengers out of stopped vehicles.[23] The Court explicitly balanced the "public interest" of police officer safety against the "personal liberty" of passengers.[24]

Tracey Maclin demonstrated that nothing in the Court's Fourth Amendment jurisprudence can be read to permit any kind of "terrorist profile."[25] Morgan Cloud has shown in his earlier work that various iterations of the drug courier profile do not provide an acceptable benchmark for deciding when the Fourth Amendment has been violated.[26] To justify a "terrorist profile" will require a new Fourth Amendment theory, drawing on the "public interest" versus "personal liberty" balance that the Court has so often used. While the theory will be new, the principle is not. We can begin with Blackstone. In 1765, he recognized that society has a right to employ "first principles" of self-protection during extraordinary times "when the contracts of society are in danger of dissolution, and the law proves too weak against the violence of fraud or oppression."[27] Perhaps a Fourth Amendment that does not recognize the al Qaeda threat is too weak against the violence of oppression implicit in their threat to destroy our culture.

Even before the attacks of September 11, Akhil Amar speculated that a 0.1 percent chance of a bomb on a plane justifies a search of the passengers.[28] It seems right to say that even the smallest risk of death to dozens or hundreds of innocent people fully justifies a seizure, interrogation and search of each passenger. If, on the other hand, the harm risked by a suspect is violation of the drug laws, it seems right to require the police to be pretty sure that he is carrying drugs before a search can

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[23] *Wilson*, 519 U.S. at 414-15.

[24] *Id.* at 413-15; *see also Mimms*, 434 U.S. at 108-09 (using same balance when it is driver's liberty interest at issue).

[25] Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471 (2003).

[26] Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843 (1985).

[27] 1 WILLIAM BLACKSTONE, COMMENTARIES *243.

[28] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 32 (1997).

be made of his person. This "sliding scale" definition of probable cause, based on the immediacy and scope of threatened harm, is intuitively appealing. After all, when the Court balances the public interest with the intrusion into liberty, why would the public interest not weigh more heavily in the bomb case than in the drug case? Drawing on a modern, relativistic meaning of "reasonable," perhaps it means "reasonable given the harm sought to be avoided."[29]

While the Court has never embraced a case-by-case sliding scale of probable cause, it has implicitly adopted a category-by-category sliding scale. Some administrative seizures require no suspicion at all. In *Michigan Department of State Police v. Sitz*,[30] the Court upheld suspicion-less drunk driving checkpoint stops, at least when the checkpoints have been set up pursuant to guidelines "governing checkpoint operations, site selection, and publicity" that were issued by an advisory committee.[31] The asserted public interest, of course, was the "increasing slaughter on our highways."[32] The permitted intrusion into liberty was pretty minimal; vehicles "would be stopped and their drivers briefly examined for signs of intoxication."[33] Because the use of the public highways is a privilege and not a right, the balance tilted in favor of the State.

No one doubts that entry into courthouses and particular areas in airports can be conditioned on submitting to questioning and on having one's luggage and person examined.[34] Pre-

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[29] Professor Matthew Hall asked during the symposium if a better defense of a terrorist profile might lie in carving out a national security exception to the Fourth Amendment. If the Fourth Amendment simply does not apply to the use of a terrorist profile in narrow circumstances, then I would not have to work so hard to defend the use of Middle Eastern origin as reasonable. I suspect it makes no difference to those who would support, or reject, a terrorist profile whether one uses my approach or the one suggested by Professor Hall. As one who can remember Richard Nixon's use of national security to defend all sorts of things that seemed indefensible to me, I guess I prefer working the "reasonable search" side of the street.

[30] 496 U.S. 444 (1990).

[31] *Sitz*, 496 U.S. at 447.

[32] *Id.* at 451 (quoting Breithaupt v. Abram, 352 U.S. 432, 439 (1957)).

[33] *Id.* at 447, 451-52.

[34] *See, e.g.*, Clancy, *supra* note 19, at 624-25 (concluding that Justice Stevens's analysis in his dissent in *Sitz* would permit these types of searches).

sumably, in the wake of September 11, entry into other public areas could be similarly conditioned. The question I pose is whether authorities can stop and examine *only* men thought to be linked to al Qaeda. One might think, logically, that if the police could search everyone who sought to enter an area that might be a terrorist target, they could search any sample from that population. But as odd as it might sound (as odd as it did sound to then-Justice Rehnquist), the administrative search/seizure context embodies the adage: "misery loves company;" police can stop all vehicles to check for registration, for example, but cannot conduct random stops.[35] The underlying rationale is roughly that when police discharge community care-taking functions, they should not be searching for evidence of crime. When they search for evidence of a crime, they should have whatever level of suspicion the Fourth Amendment requires.[36] Thus, *Sitz* and the other administrative search cases that refuse to allow authorities to single out particular persons would be of no use in seeking to justify a "terrorist profile."

Another doctrine that departs from strict probable cause is *Terry v. Ohio*,[37] where the Court held that reasonable suspicion to believe that crime is "afoot" and that the suspect is armed and dangerous justifies a temporary "stop" to investigate.[38] This stop typically includes brief questioning.[39] While the majority opinion is vague about whether the "stop" always permits a "frisk" for weapons, Justice Harlan's concurring opinion made this plain: "Where such a stop is reasonable . . . the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime

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[35] Delaware v. Prouse, 440 U.S. 648, 664 (1979). The "misery loves company" reference is from Justice Rehnquist's dissent. *Prouse*, 440 U.S. at 664 (Rehnquist, J., dissenting). It still sounds odd to Thomas Clancy. *See* Clancy, *supra* note 19, at 622-23 (noting that the discretion of officers in field was not "evil that the Fourth Amendment was designed to combat").

[36] *Prouse*, 440 U.S. at 653-54. Checkpoint stops looking for evidence of drunk drivers are a bit of a blend between community care-taking and searching for evidence of a crime. The hybrid nature of the checkpoints explains why the Court approved only a stop and brief examination of the driver.

[37] 392 U.S. 1 (1968).

[38] *Terry*, 392 U.S. at 30.

[39] *Id.*

of violence."[40] Because the interference with liberty—the stop—was less severe than an arrest, police needed only reasonable suspicion rather than probable cause. Though the Court has never said exactly how much "lower" the threshold is for reasonable suspicion than probable cause, it has told us that a lesser quantum and quality of suspicion is acceptable.[41]

Given what we now know about al Qaeda's threat, perhaps we can apply the *Terry* stop and frisk regime, permitting brief questioning as well as a frisk for weapons, when three factors are present—the suspect is a man between the ages of, say, eighteen and forty; he is from the Middle East; and he is attempting to board a commercial airliner or enter a public building, public utility or sports facility. The right of the police to stop and question those who might pose a danger to the community can be traced back to the nightwatch, "the major instrument of police protection in New York City" and in the other major cities of Europe and America in the eighteenth century.[42] This procedure was "extensively treated both by statute and by judicial decision as a reasonable and necessary police authority for the prevention of crime and the preservation of public order."[43]

But the *Terry* stop requires, if the nightwatch stop did not, a reason to believe that the person poses a threat.[44] The Court has insisted under the *Terry* doctrine that "an officer's reliance on a mere 'hunch' is insufficient to justify a stop."[45] In a recent

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[40] *Id.* at 33 (Harlan, J., concurring).

[41] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 274 (2002) (noting that "the likelihood of criminal activity need not rise to the level required for probable cause").

[42] DOUGLAS GREENBERG, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, *in* 1 THE COLONIES AND EARLY REPUBLIC, at 266, CRIME AND JUSTICE IN AMERICAN HISTORY (Eric H. Monkkonen ed., 1991).

[43] People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964) (citing Lawrence v. Hedger, 128 Eng. Rep. 6 (C.D.P. 1810); 2 HALE, PLEAS OF THE CROWN 89, 96-97 (Amer. ed. 1847); 2 HAWKINS, PLEAS OF THE CROWN 122, 129 (6th ed. 1777)).

[44] *Terry*, 392 U.S. at 30. I know of no evidence that indicates whether nightwatchmen could stop anyone or whether they had to have some level of suspicion. Nightwatchmen could *arrest* only for crimes "committed before their eyes or if they were acting under the direction of a police officer." James Richardson, THE NEW YORK POLICE, COLONIAL TIMES TO 1901, at 18 (1970).

[45] *Id.*

Terry case, the Court held that an anonymous tip describing someone who was then selling drugs on a street corner will not permit the police minutes later to frisk a person who matched that description.[46] It would be very difficult to square these cases with a blanket rule that reasonable suspicion exists to stop and frisk all young Middle Eastern men who seek access to certain public areas.

A more helpful line of cases are the administrative search cases where the Court requires probable cause but understands probable cause in a way different from probable cause to suspect crime. In *Camara v. Municipal Court*,[47] the Court held that a warrant, based on probable cause, was necessary before a town could compel compliance with a municipal code inspection scheme.[48] But the "probable cause" for these warrants need not show probability of finding a violation in a particular home.[49] Rather, the Court suggested that the probable cause standards,

> which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[50]

The Court justified this "generic" probable cause (criticized in an earlier case as authorizing "synthetic search warrants"[51]) on the ground that it "gives full recognition to the competing public and private interests here at stake."[52] The public interest identified in *Camara* was the protection of the public from "development of conditions which are hazardous to public health and safety."[53] Inspectors would not know *ex ante* how

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[46] Florida v. J.L., 529 U.S. 266, 271 (2000).
[47] 387 U.S. 523 (1967).
[48] *Camara*, 387 U.S. at 538.
[49] *Id.*
[50] *Id.*
[51] Frank v. Maryland, 359 U.S. 360, 373 (1959).
[52] *Camara*, 387 U.S. at 539.
[53] *Id.* at 535.

many units in a given area contain dangers to the public health and safety.[54] Yet the risk that one, a few or many might pose a risk permits authorities to obtain warrants that authorize inspectors to compel entry into homes.[55]

In light of *Camara*, and given the risk of catastrophic harm that we have already seen realized, perhaps the authorities have *Camara*-style probable cause to search all young Middle Eastern men who seek access to potential terrorist targets. In *Camara*, the Court found probable cause based on an unknown probability of finding a safety or health code violation.[56] The risks that these violations pose if undiscovered—fire, disease carried by animals, unsightly conditions that depress property values[57]—are limited to the building or the neighborhood and are far less imminent and harmful than the failure to stop the September 11 terrorists proved to be.

If we probe a bit deeper, *Camara* provides even stronger support for a "terrorist profile" based on "generic" probable cause. In *Camara*, the Court recognized that the purpose of the administrative inspection was to protect public health and safety: "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property."[58] Of course, it is likely that criminal offenses will be uncovered during these inspections—the very failure to maintain premises in a safe condition may be a municipal code criminal violation—but uncovering crime is not the dominant purpose of the inspections. The Court has distinguished routine drug testing of customs agents from routine drug testing of pregnant mothers on precisely this ground, finding that in the former case, but not the latter, the dominant purpose was to protect public safety rather than to uncover and threaten to punish drug violations.[59]

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[54] *Id.* at 536.
[55] *Id.* at 539.
[56] *Id.* at 538.
[57] *Id.* at 535.
[58] *Id.*
[59] *Compare* Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 677 (1989) (permitting testing of customs agents), *with* Ferguson v. City of Charleston,

When authorities deploy a terrorist profile, their principal purpose is to protect the American public from catastrophic harm. To be sure, a secondary purpose is to apprehend terrorists who cause catastrophic harm, but the following thought experiment should be considered. Suppose the authorities on the evening of September 10 had a choice between foiling the plot and causing the terrorists to flee or arresting all nineteen hijackers after the planes had done their destruction. (I have no idea how this would be possible, but it is only a thought experiment). In the former case, the escape of the nineteen terrorists presumably increases the chances that the network would regroup and seek to accomplish its destructive goals at a later time. But on the time tested theory that it is always best to defer pain and death, I think the authorities would have chosen option number one, even if it meant no one was arrested. If I am right about that, the dominant purpose in profiling terrorists is to protect the public safety.

In *New York v. Burger*,[60] the Court upheld an "inspection" scheme that seemed directed more at unearthing crime than protecting the public from harm.[61] A New York statute required "chop shops" (vehicle dismantlers) to keep records and permit inspections without regard to individualized suspicion.[62] The Court conceded in the first paragraph of the opinion that the "ultimate purpose" of the regulatory scheme was "the deterrence of criminal behavior"[63] yet upheld a criminal conviction based on evidence uncovered in a suspicionless "inspection."[64] A terrorist profile is indistinguishable. Its ultimate purpose would be to deter criminal behavior that causes catastrophic harm. If that goal also produced arrests of terrorists, *Burger* stands for the proposition that the "discovery of evidence of crimes" does not "render the search illegal or the ad-

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532 U.S. 67, 68 (2001) (invalidating Charleston drug testing policy because of its reliance on use of law enforcement "to coerce patients into substance abuse treatment").

[60] 482 U.S. 691 (1987).

[61] *Burger*, 482 U.S. at 716.

[62] *Id.* at 694.

[63] *Id.* at 693.

[64] *Id.* at 719.

ministrative scheme suspect."[65] And it goes without saying that the goal of protecting the public from stolen auto parts pales in significance when compared to protecting the public from terrorism on the scale of September 11.

Thus, of all the Fourth Amendment doctrines, I think *Camara* provides the best argument for the constitutionality of a terrorist profile. I read Thomas Clancy to agree that this is the best argument. Prior to September 11, he concluded that the "potential for mass harm" underlies many applications of the *Camara* scheme.[66] Whether the potential for mass harm justifies the use of race to construct a *Camara*-style profile remains a difficult question. My terrorist profile is based on *more* than Middle Eastern origin. It is also based on sex and age. Moreover, unlike the "bad" racial profiling for drugs, the terrorist profile intervention is limited to places where a terrorist could cause mass harm. Police could not use the terrorist profile to harass individuals on the street in Arab-American communities or to pull over vehicles on the New Jersey turnpike.

Even so, this reading of the Fourth Amendment ensures that almost all of the terrorist stops and searches would be of completely innocent men. The probability that a particular Middle Eastern young male intends to blow up an airliner or public building is surely much less than 0.1%. But in applying *Camara*, courts need not quantify the likelihood that a particular dwelling is in violation of the relevant municipal codes. The goal is to protect the public safety. As long as al Qaeda threatens catastrophic harm to American interests, perhaps courts need not quantify the harm that a particular individual is a member of al Qaeda.[67]

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[65] *Id.* at 716.

[66] Clancy, *supra* note 19, at 617. I do not mean to suggest that Clancy agrees with these cases or agrees that my terrorist profile is constitutional. In general, Clancy believes the Court has gone too far in permitting searches without individualized suspicion.

[67] One reader noted that my terrorist profile is also under-inclusive as it would not pick up Jose Padilla or other non-Arab Muslims. True enough, but all inspection schemes are under-inclusive. At any given moment in America's large cities, thousands of health and safety code violations are present and undiscov-

I do not know whether this approach is consistent with the Fourth Amendment or the Equal Protection Clause. But assume you had been working airport security on September 11 in either Logan Airport or Newark Airport and you had advance knowledge from the CIA that al Qaeda had a plan to hijack commercial airliners and slam them into the World Trade Center, the Pentagon and the White House. The CIA does not know when the plan will be attempted or even whether it will be attempted, but the CIA has solid information that the plan exists. Would you have permitted these young Middle Eastern men to board the planes without searching them?

One might argue that the situation we now face is a harder case because we do not have, as far as I know, solid evidence about what the next terror act will be. But perhaps the case is not harder. Al Qaeda leaders continue to "promise" that they will hit America and hit it hard.[68] Osama Bin Laden has said on many occasions that our complete destruction is his goal.[69] We have seen in Bali, Morocco and Saudi Arabia that al Qaeda still possesses the ability to engage in terror that kills hundreds of innocent civilians.[70] So we *do* possess solid information that al Qaeda will attempt another attack and seek to kill hundreds or thousands or tens of thousands. That we do not know when or where simply makes the suspicion transferable from one particular venue—commercial airliners—to other plausible venues such as sports stadiums, public buildings, public utilities and tourist attractions.

Robert Mueller, the director of the FBI, said in December,

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[68] Susan Sachs & Bill Carter, *A Nation Challenged: Al Qaeda: Bin Laden Spokesman Threatens Westerners at Home and in the Gulf*, N.Y. TIMES, Oct. 14, 2001, at B1.

[69] Associated Press, *Statement Allegedly from Al Qaeda Threatens Attacks*, CHI. TRIB., Nov. 17, 2002, at C21; Tim Weiner, *A Nation Challenged: The Leader—A Man in the News: Seizing the Prophet's Mantle: Muhammed Omar*, N.Y. TIMES, Dec. 7, 2001, at B3. One of Bin Laden's lieutenants said in November that America's only chance to avoid destruction was to cease supporting Israel and convert to Islam.

[70] Rajiv Chandrasekaran, *Purported Bin Laden Tape Lauds Bali, Moscow Attacks,* WASH. POST, Nov. 9, 2002, at A15; Ellen Nakashima & Alan Sipress, *Jailed Indonesian Suspect Details Links to Bombings: Man Said to Describe Bali Attacks as "Revenge" on U.S.*, WASH. POST, Nov. 9, 2002, at A15.

2002, that the authorities had foiled one hundred planned terrorist attacks in the months since September 11, 2001.[71] Without supporting evidence, one is permitted to be skeptical. But even if the number of foiled attacks that posed catastrophic risk is only a handful, that is clear evidence that we continue to be at risk from terrorist groups.

In recognition of the heightened terrorist threat to American security, the Department of Justice Civil Rights Division permits authorities more latitude when they seek to protect the public from catastrophic harm. The "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," promulgated in 2003,[72] forbids some routine law enforcement practices that rely on race even when they "might otherwise be lawful" under federal law and the Constitution[73]—i.e., the rules for the use of race in routine law enforcement are meant to be stricter than the minimum required by law. But when law enforcement activities involve "threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or . . . the integrity of the Nation's borders," the Justice Department *may* consider race and ethnicity to the extent permitted by the Constitution and federal law.[74] If my argument that the Constitution permits a limited use of Middle Eastern status were to prevail, the new federal guidelines would also permit that use.

One weakness in this argument is that the only way the authorities, in most cases, can identify a young man as Middle Eastern is from his appearance. Should the appearance of being from the Middle East permit authorities to stop and search young men who seek to board airliners or to enter public

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[71] Dan Eggen, *Mueller Defends FBI's Performance*, N.Y. TIMES, Dec. 20, 2002, at A41; *FBI: Many Attacks Thwarted Since 9/11*, NEWSDAY, Dec. 15, 2002, at A17.

[72] For the sharp-eyed reader who wonders how a paper given in 2002 can cite guidelines published in 2003, be assured that I have not discovered time travel. This paragraph was added while the paper was being prepared for publication.

[73] *See* Civil Rights Div., U.S. Dep't of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

[74] *Id.*

buildings or other public areas that are particularly vulnerable to attack? Because I start with the presumption that profiling based on race is morally offensive, I am torn by this question. To answer in the affirmative recalls the horrible times in our past where people have been stereotyped and openly discriminated against on the basis of skin color or appearance.

Yet to say that authorities are forbidden to act on an inference that arises from the al Qaeda threat might concede too much to those who would destroy us. When police profile by race in the "war on drugs," they are making an inference about the probability that if we knew the universe of those who transport or sell drugs, we would find certain racial groups over-represented. It is this unproven inference, I believe, that is morally offensive. But if we could identify the universe of al Qaeda terrorists, it would be almost exclusively Muslim men. Indeed, nineteen men on September 11 hijacked four planes simultaneously, killed three thousand innocent people and did billions of dollars in damage. Had they managed to strike the White House or the Congress, the blow to our polity would have been immense. Of those nineteen terrorists, one hundred percent were young Middle Eastern men.

If a particular group—al Qaeda in this case—consists of one race, perhaps it is not morally or constitutionally offensive to use that fact to make predictions. The Ku Klux Klan has bombed black churches in the past. In the midst of one of these bombing sprees, would it violate the Constitution if the police searched any young white man who approached within so many feet of a black church? Maybe not. Moreover, while the inference that many Middle Eastern men are anti-American is certainly offensive, one significant strand of the Islamic faith preaches the destruction of the West. Unlike the "Red Scare" in the 1950s, we have solid evidence that al Qaeda possesses the ability to infiltrate our country and kill thousands of Americans and cause billions of dollars in damage.

European countries typically permit a stop without any suspicion to check identification as a routine part of their attempt to maintain a safe society.[75] Some European countries

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[75] *See, e.g.*, Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE: A WORLDWIDE

permit what amounts to an arrest and a search based on pretty low suspicion that the individual poses a threat.[76] A terrorist profile fits roughly into this framework; however, I have sought to defend it here as an application of the *Camara* administrative search scheme which does not rely on particularized suspicion. Many will reject a terrorist profile as going too far. They may well be right. As soon as we can safely conclude that there is no longer a realistic terrorist threat, any justification for a terrorist profile would disappear, and that would be a happy day indeed. But the continuing threat that we face today might justify reading the Fourth Amendment in the way I have sketched. As many have noted, the world has grown smaller, and we are now vulnerable to those who would harm us. Indeed, given our generally lax laws and lax enforcement on immigration and identification, we are probably more vulnerable than most European countries.

I have sketched a liberty-restricting reading of the Fourth Amendment. I have also tried to describe the problems with that reading. You decide which is the better way to read the Fourth Amendment. I now discuss the part of my proposal that benefits civil liberties by making offensive racial profiling harder to disguise.

II.

Consent is an acid that has eaten away the Fourth Amendment. It allows police to "fish" for evidence without any suspicion whatsoever. One police detective said that as many as ninety-eight percent of the searches he conducts are consent searches.[77] That might be an exaggeration—I know of no data

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STUDY 151-52 (Craig Bradley ed., 1999) (noting that French law specifically permits stops to demand identity within twenty kilometers of "certain borders, or in the public areas of designated ports, airports, train stations, and truck depots open to international traffic"); Rachel Vancleve, *Italy*, *in id.* at 247; Richard Vogler, *Spain*, *in id.* at 375.

[76] See Vogler, *Spain*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 75, at 376 ("[T]he search of a person disembarking from a bus which had come from an area well-known for drug dealing would not be considered to be in breach of constitutional protections.").

[77] RICHARD VAN DRUIZEN ET AL., THE SEARCH WARRANT PROCESS 21 (1984).

on this point—but it is no exaggeration that police routinely request consent. In the last few years, we have seen a lot of evidence that the consent "fishing pond" is well-stocked with fish. Almost everyone gives consent when asked by police, and, surprisingly, a large percentage of guilty suspects consent to the very search that will turn up evidence against them.

The consent search doctrine is the handmaiden of racial profiling.[78] On the street, police can approach young men and ask for consent to search solely on the basis of race. The Court has made plain that these "consensual encounters" are not Fourth Amendment events,[79] despite how unrealistic an interpretation of "seizure" this may be.[80] At a roadblock, or following a traffic stop, police can use race and only race to decide which cars merit further attention or which drivers to ask for consent to search their cars.[81] As we all know from experience as drivers, probable cause to believe that a particular car has violated one of hundreds of traffic laws is pretty easy to obtain. The New Jersey Supreme Court said recently that "it is virtually impossible to drive and not unwittingly commit some infraction of our motor vehicle code."[82]

If police are routinely rewarded with consent, they have little incentive to develop individualized probable cause or to worry about racial profiling. If they concentrate their "consen-

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[78] I do not intend to claim that police only ask for consent from racial minorities. They surely engage in hunches based on other factors, some likely to be useful inferences and some based on other kinds of stereotypes. A student of mine drove across country with Grateful Dead stickers all over his van and was stopped in Kansas and detained for an hour while the police thoroughly searched his van with his consent.

[79] The Court has said repeatedly that the police need no suspicion at all to approach a suspect in a public place. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 431, 434 (1991).

[80] For an excellent critique of the Court's "consensual encounter" Fourth Amendment doctrine, see Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001).

[81] Police can set up roadblocks to check for drunk driving or vehicle registration. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454-55 (1990) (sobriety checkpoints); Delaware v. Prouse, 440 U.S. 648, 656-57 (1979) (dictum) (vehicle inspection checkpoints); Schneckloth v. Bustamonte, 412 U.S. 218, 227-28 (1973) (consent given after traffic stop).

[82] State v. Carty, 790 A.2d 903, 908 (N.J. 2002).

sual encounters" and their persuasive powers on racial minorities who are dressed in particular ways because they think this improves the "yield" in terms of successful drug busts,[83] it would be difficult for anyone to prove racial profiling. Police can turn a consensual stop on the street or a routine traffic stop into a consensual search in a wide variety of ways. They can, of course, testify falsely that the suspect consented when in fact he did not. Moreover, given how often suspects mumble when confronting a police officer, at least in reported cases,[84] the officer can often testify that he understood the answer to give consent without having to tell an outright lie.

There is no way to know how often police turn an evasive answer or an outright refusal into consent when testifying before the suppression judge, but I believe most suspects give some kind of grudging consent or acquiescence to searches that produce evidence of criminal activity.[85] The seeming irrationality of this act can be explained along two, probably overlapping, lines. First, the suspect might think that the act of giving consent will persuade the officer that there is nothing to be found and he will not bother to search (and we do not know how often police do in fact move on to another, and presumably better, target). Second, the suspect likely believes that he has no choice but to consent. Faced with no choice and the chance to appear innocent, many suspects "give it up" by consenting.

Consent probably flows even more easily during vehicle stops than on the street. Unlike the pedestrian, who at least in theory can simply ignore the officer's request and proceed on his way, the motorist knows that she cannot proceed until the officer chooses to let her go. In addition, the suspect who is

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[83] Data exists suggesting that while Hispanics and blacks are no more likely to be found in possession of narcotics than whites or Asians, they are more likely to be in possession of large amounts of narcotics. *See* George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 RUTGERS RACE & L. REV. 39, 41-43 (2000) (discussing data analyzed by Dr. Illya Lichtenberg).

[84] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 7 (1968).

[85] *See* Clancy, *supra* note 19. I once had college student clients who told me that they gave consent to the deputy sheriff to search the trunk of their car even though they knew it contained cocaine.

stopped on the street may be close to home or in the presence of friends and thus feel more capable of resisting the pressure to consent. Most cars contain only the driver, and the vehicle is often far from the driver's neighborhood. If the motorist is alone and far from home, the incentive to cooperate, or to appear to cooperate, is particularly strong.

But is this acquiescence to the apparently inevitable a reasonable search under the Fourth Amendment? Or, turning the question around, why does consent make the Fourth Amendment disappear? We saw in the last Part that there is no original understanding of a "reasonable" search, and that the Court has simply followed modern, relativistic usage in creating categories of searches that are, and are not, reasonable. Consent is, however, different from all the other categories. First, consent is unlike administrative inspections because the purpose of asking for consent is to search for evidence of a crime. Moreover, consent is unlike the doctrines that permit a search for evidence because consent substitutes for suspicion of wrongdoing. So how does the Court justify admitting evidence seized without grounds to suspect wrongdoing?

The Court has offered two theories. First, consent could be a waiver of the Fourth Amendment's protection. Defendants can waive the right to a lawyer and to all the protections associated with trial. Indeed, a guilty plea waives all of those rights. Symmetry with other criminal procedure rights suggests that a suspect could also waive the Fourth Amendment's protections.

Second, irrespective of waiver, consent could be viewed as making the search reasonable.[86] The Court has settled on the second conceptual justification for the consent search doctrine. Consent satisfies the Fourth Amendment as long as it was voluntarily given. The State need not show waiver. This is a significant doctrinal development because waiver must be knowing and intelligent as well as voluntary.[87] If the State

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[86] *See* Illinois v. Rodriguez, 497 U.S. 177, 183-84 (1990).

[87] This waiver standard first appears in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), in conjunction with the waiver of the right to counsel. It is the standard the Court established in *Miranda v. Arizona*, 384 U.S. 436, 460-62 (1966), for the waiver of the Fifth Amendment privilege against compelled self incrimination. *See*

cannot show a knowing and intelligent relinquishment of the right not to be searched without probable cause, why does consent nonetheless satisfy the Fourth Amendment? The Court hasn't provided much of an explanation. In *Schneckloth v. Bustamonte*,[88] the Court spoke vaguely about an accommodation of the need for the evidence and the intrusion into the suspect's liberty.[89] The Court decided this balance went the State's way as long as the consent was voluntarily given: "As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."[90]

But this is a pretty thin justification, especially since all of the Court's early consent cases assumed that waiver was the proper standard.[91] *Amos v. United States* is the earliest of the Court's Fourth Amendment cases raising "consent,"[92] and its discussion is typical of the pre-*Schneckloth* cases. Here is the Court's entire discussion of this issue:

> The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.[93]

It is impossible to read this paragraph as based on a theory other than waiver. To reject waiver as the operative principle on the vague ground that voluntary consent is a better

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also Barber v. Page, 390 U.S. 719, 724-26 (1968) (waiver of right to confront witnesses); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 276 (1942) (waiver of right to jury trial).

[88] 412 U.S. 218 (1973).

[89] *Schneckloth*, 412 U.S. at 224-25.

[90] *Id.* at 227.

[91] *See, e.g.*, Amos v. United States, 255 U.S. 313, 317 (1921).

[92] *Amos*, 255 U.S. at 317.

[93] *Id.*

accommodation of the competing values is a remarkable judicial sleight of hand that passed almost unnoticed.[94] Though *Schneckloth* was one of the first cases argued in the Term, it was one of the last decided. Justice Stewart placed his clerk's draft of the opinion in the top drawer of his desk and purposely ignored it.[95] The absence of any instructions for revisions or comments led the clerks to joke among themselves about whether anyone had seen *Schneckloth*.[96] At one point, Stewart's clerk asked the Justice, "Have you seen *Schneckloth*?"[97] Stewart opened his desk drawer and said, "Yes . . . I can see it any time I want."[98] The clerk believed that Stewart was holding the opinion so that he could circulate it late in the Term, leaving little time for "yet another grueling debate over the Fourth Amendment."[99] Perhaps the lack of time for debate and consultation explains the Court's vapid justification for holding that voluntary consent effectively waives the Fourth Amendment.

When the Court returned to this issue almost twenty years later, it did no better. In *Illinois v. Rodriguez*,[100] the Court was faced with a search based on apparent authority.[101] Waiver theory could not, of course, justify a search on apparent authority. If the one giving consent lacked actual authority to consent, there would be no basis by which a court could find that the owner had waived his Fourth Amendment rights, as Justice Thurgood Marshall argued in his dissent.[102] With almost no explanation, the Court extended *Schneckloth* to hold that a consent search can be reasonable under the Fourth

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[94] Justice Marshall's dissent in *Schneckloth* raises the lack of authority for the Court's holding, but only in a footnote. *Schneckloth*, 412 U.S. at 279 n.5 (Marshall, J., dissenting). Most of Marshall's quite powerful dissent is aimed at the Court's underlying premise that consent can be valid even though the person giving it did not know of his right to refuse. *Id.* at 277-90 (Marshall, J., dissenting).

[95] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 270-71 (1979).

[96] *Id.* at 270.

[97] *Id.* at 271.

[98] *Id.*

[99] *Id.*

[100] 497 U.S. 177 (1990).

[101] *Rodriguez*, 497 U.S. at 179.

[102] *Id.* at 189-98 (Marshall, J., dissenting).

Amendment even when, as a factual matter, the party giving consent lacked the authority to do so.[103] The Court cautioned that one who consents "is assured by the Fourth Amendment . . . not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"[104]

But if consent searches are ultimately explained as simply reasonable searches, it might be that a consent search can be unreasonable *even if the police obtain actual consent*. This could be true in two ways. First, actual consent based on acquiescence or the belief that one has no choice might not suffice to comply with the Fourth Amendment because it might not be voluntary. Presumably, the solution to that problem, explicitly rejected by the Court in *Schneckloth*, would be to require police to give suspects *Miranda*-type warnings to inform them that they need not consent. Construing the New Jersey state constitution, the state supreme court has followed the path the United States Supreme Court rejected. In *State v. Johnson*,[105] the state court found the *Schneckloth* "totality of the circumstances" test inadequate to ensure that a consent search was reasonable, preferring instead the waiver standard.[106] The court held that the State had the burden of proving that consent was given knowingly and voluntarily, a burden that included proving the suspect knew that he "had a choice in the matter."[107] The New Jersey State Police subsequently developed a "Consent to Search" form that authorizes the trooper to conduct a complete search of the vehicle or other premises described on the form.[108] The form itself states that the individual has been advised of the right to refuse giving consent as well as the right to withdraw consent at any time.[109]

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[103] *Id.* at 186.

[104] *Id.* at 183.

[105] 346 A.2d 66 (N.J. 1975).

[106] *Johnson*, 346 A.2d at 68.

[107] *Id.* at 68. A dissenting opinion in *Johnson* would have gone even farther and required an "express warning to the individual as to his rights." *Id.* at 76 (Pashman, J., dissenting).

[108] State v. Carty, 790 A.2d 903, 907 (N.J. 2002).

[109] *Carty*, 790 A.2d at 907.

The second way that actual consent might fail to meet Fourth Amendment standards is that the Fourth Amendment might require particularized suspicion before police can search for evidence of a crime. While this argument sounds radical—you mean suspects are not *permitted* to consent to a search?—I think on closer inspection, it is not so radical after all. The consent search category is really the radical idea, not the other way around. The consent doctrine is an outlier compared to other categories of reasonable warrantless searches. Searches based on exigent circumstances, searches of vehicles and searches incident to arrest[110] all require probable cause. Moreover, each can be traced back to colonial times. The common law recognized search incident to arrest, though the precise scope of the search that was permitted is unclear.[111] Warrantless searches of ships based on probable cause were authorized by statutes passed before and after the Fourth Amendment was ratified.[112] Arrests of suspects caught by the "hue

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[110] I exclude from my typology the various types of regulatory inspections and plain view observations because neither is truly a search in the Fourth Amendment sense. An inspection or inventory has as its central goal ensuring compliance with a regulatory regime rather than looking for evidence. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 373-76 (1976). The Supreme Court has told us that what is in plain view and knowingly exposed to the public is not even protected by the Fourth Amendment. *See* Katz v. United States, 389 U.S. 347, 351 (1967).

[111] Davies explains the scope problem, this way:

> The most likely reason that little was said in the common-law sources about the scope of searches incident to arrest is that such searches were conducted primarily in connection with arrests made in fresh pursuit. Except in that setting, officers would not usually have made arrests for theft until after the property was discovered with a search warrant for stolen goods; without the recovered property, it would usually have been difficult to justify the arrest.

Davies, *supra* note 13, at 647 n.277.

[112] *See, e.g.,* Act of Mar. 2, 1799, ch. 22, 1 Stat. 627, 677-78 (repealed) (after ratification); Act of Feb. 18, 1793, ch. 8, 1 Stat. 305, 315 (after ratification); Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (prior to ratification). Davies makes a powerful case that the Framers would have regarded ships as not included in "persons, houses, papers, and effects" because ships were *sui generis*. Davies, *supra* note 13, at 605-08. Thus, my claim in the text is only that vehicle searches can be traced back to searches recognized at the common law, not that vehicle searches were themselves recognized. That we treat vehicles differently from houses for Fourth Amendment purposes today can be explained by some of the reasons that

and cry," and based on probable cause, were the forerunner to exigent circumstance searches.[113] That consent is a "newfangled" theory for finding a search reasonable,[114] and that it requires no probable cause or any suspicion might explain why the Court did not embrace consent as a reasonable search until 1973. Perhaps it is time to rethink consent searches. I think it coherent, if not inevitable, to conclude that searches produced largely by acquiescence to police authority are simply not reasonable searches.

The New Jersey Supreme Court agrees to a point. A quarter century after the state court required knowing consent in *Johnson*, the court in *State v. Carty*[115] found that even informed consent was inadequate to protect privacy rights when a car has been stopped on the highway and the state police ask for consent to search.[116] The state court found motorists are at the mercy of state police because, as noted earlier, it is "virtually impossible to drive and not unwittingly commit some infraction of our motor code."[117] Moreover, troopers who have lawfully stopped a car have complete, and thus standardless, discretion to decide from whom to request consent.[118] In addition, the articulated basis for the stop is almost never related to the reason to request consent—that is, making a traffic stop, for, say, speeding creates no suspicion that the car contains drugs or evidence of a crime. Finally, "where the individual is at the side of the road and confronted by a uniformed officer

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ships were viewed as outside the Fourth Amendment. As Davies puts it: "Even during the prerevolutionary struggle with Parliament, American Whigs accepted the legitimacy of extensive government regulation and inspection of shipping." *Id.* at 605. Vehicles are today heavily regulated and subject to inspection much more than homes.

[113] Davies, *supra* note 13, at 622 (noting that "hue and cry" seems to have been used largely in response to "fresh" crimes, "especially robbery and escapes").

[114] The Framers likely would not have considered the possibility that a lowly constable would ask for consent to search or that any freeman would give consent to someone of that class. The common law permitted resistance to an unlawful arrest and would probably have permitted resistance to any attempt by a constable to search in the absence of an arrest.

[115] 790 A.2d 903 (N.J. 2002).

[116] *Carty*, 790 A.2d at 911.

[117] *Id.* at 908.

[118] *Id.*

seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent."[119] Thus, the continued detention while obtaining consent and carrying out the search, the New Jersey court held, was itself a violation equivalent to the Fourth Amendment unless the detention was justified by reasonable suspicion.[120]

The "cumulative effect" of these factors led the *Carty* court to conclude that "we no longer have confidence that a consent search under *Johnson* truly can be voluntary *or otherwise reasonable*."[121] The italicized portion of that quote is precisely my argument in this paper. In effect, the New Jersey Supreme Court rejected the waiver theory it had endorsed in *Johnson* and returned to the general question of what makes a consent search reasonable. Unlike *Schneckloth*, which found the answer in voluntariness, the New Jersey Supreme Court held that a consent to search is always unreasonable unless the officers had, prior to requesting consent, a reasonable suspicion that a crime has been, or is about to be, committed.[122] This standard, drawn from the "stop and frisk" case of *Terry v. Ohio*, is a lesser standard than the probable cause standard that would be necessary to justify a search of a car in the absence of consent.[123] Thus, *Carty* creates two standards for searching motorists or vehicles. One standard regulates requests for consent to search, and one standard governs thorough searches of a car or a motorist without consent.

This is a bold, innovative step in the right direction, but I wonder if the problem with consent searches does not require a bolder step. To my mind, the real problem is not that police do not have standards for deciding whom to ask for consent. The real problem is that police get consent so easily that the Fourth Amendment disappears when police ask for consent. The right solution to *that* problem is not to permit police to ask for consent in a discrete category of cases.[124] If police need probable

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[119] *Id.* at 910.
[120] *Id.* at 912.
[121] *Id.* at 911 (emphasis added).
[122] *Id.* at 905.
[123] Carroll v. United States, 267 U.S. 132 (1925).
[124] By definition, when the State relies on consent to justify a car search, the

cause to search a car in the absence of consent, why would they need less when drivers give consent that the state court decided was the likely product of compulsion? By permitting consent to justify searches based on a lower standard, the New Jersey Supreme Court is counting the consent as a partial justification for the search. In effect, the state court is saying that consent is, as a constitutional matter, a little flawed but not completely flawed.

Janice Nadler, after reviewing empirical evidence, concludes that genuine consent is unlikely in the face of a police request.[125] If consent to a police search is generally not voluntary, then it makes more sense to me to ignore it entirely. Indeed, although the analogy is imperfect, contract law sometimes effectively disregards the "consent" given in a contract of adhesion.[126] Courts have disregarded the literal reading of an insurance contract, for example, on the ground that the parties were of unequal bargaining power, and the insured could reasonably have believed that a certain activity was covered even when it plainly was not.[127] Similarly, if the one who gives consent to an officer reasonably believes that he has no choice, the contract of adhesion theory suggests disregarding that consent entirely, not just requiring the police to have reasonable suspicion before they can act on the consent.

Abolishing consent searches would deprive police of their most effective racial profiling tool. As police can approach anyone on the street to ask for consent and can ask any driver who is stopped for a traffic infraction for consent, police are presently free to use race, and only race, to decide when to ask for consent in a huge number of situations. If police have to show probable cause to conduct a search, on the other hand, their

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police lack probable cause to arrest; otherwise, they could conduct a thorough search of the arrestee or arrestees and the interior of the vehicle. New York v. Belton, 453 U.S. 454, 461-62 (1981).

[125] Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 211.

[126] A member of the audience at the February 21, 2003, symposium suggested this analogy. I failed to get his name but thank him anyway.

[127] *See, e.g.*, Garden State Indem. Co. v. Miller & Pincus, 773 A.2d 1204, 1206-07 (N.J. Super. Ct. App. Div. 2001).

discretion to use race is severely limited. Abolishing consent searches would do far more to remedy racial profiling in the real world than all the equal protection laws or statutory remedies that can be imagined. Abolishing consent would also make unnecessary various middle-ground solutions designed to measure when consent is "real" as opposed to police-induced.[128]

Consent searches still play a role in the Fourth Amendment. Consent could be a reasonable basis to search persons who seek access to airports, bus stations, public buildings, sports stadiums, public utilities and similar sites where catastrophic harm is possible. No one has a right to be in these areas if he poses a risk to the public. Thus, I think it is reasonable, and constitutionally permissible, to permit authorities to request consent to search as a condition for entry into these public areas. If a court were to adopt the first half of my argument about the use of a terrorist profile, authorities would not need consent to search young men of Middle Eastern origin. But al Qaeda is not the only threat to public buildings. To condition entry on consent to search seems a plausible way of more broadly protecting the public. This kind of consent request is, by its nature, subject to much less discretion than the request for consent when the officer sees someone on the street or in a car. People pretty much have to go onto streets, and most of us drive. But we do not have to go to airports, bus stations, sports stadiums and public utilities. The universe of "targets" is thus, to a large degree, self-selected rather than being selected by the police.

Rejecting consent as a general basis for allowing searches moves us back in the direction of the robust Fourth Amendment that the Court created when it first began to consider the right to be secure in our persons, houses, papers and effects. In 1926, the Fourth Amendment was a castle against governmental intrusion. Though it may be difficult for modern readers to appreciate, the Fourth Amendment of that era forbade the

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[128] *See, e.g.*, Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239 (1993). In my judgment, these complex solutions, like all complex balancing tests, are ultimately self-defeating because they can be easily finessed by police and avoided by judges seeking to admit reliable evidence of guilt.

search of a home for lawfully-possessed evidence *even when the police were armed with a search warrant based on probable cause*.[129] When the police sought contraband, the Fourth Amendment required a search warrant to search a home.[130] It permitted a search of a car for contraband without a warrant but only when the car was seized on the open road and the police had probable cause to search it.[131] Fast forward to 2003. A car, a person or a home can be searched without any suspicion if the police obtain consent.[132] A bus passenger can be searched if he gives "consent" when approached by police who have blocked the aisle in both directions before requesting consent.[133] This is not a Fourth Amendment the fiercely independent Framers would have recognized. They would ask the hard question: how did we get ourselves in this mess?

Given their fear of the central government, the Framers would not be surprised that federal police officers and state officers assisting in the federal war on drugs sought a way to detain and search almost anyone they wish. The fear of the writs of assistance suffered under King George III led to the adoption of the Fourth Amendment. Now the federal drug police have something just as good—the power to cajole, wheedle, impede and pressure citizens to give up their Fourth Amendment liberties by acquiescing to a police request for consent. And this new innovation in efficient policing requires neither an Act of Congress nor a trip to a magistrate's office for a warrant.

While the Framers would no doubt expect pressure from the police to search broadly, they would be deeply disappointed in the failure of Congress and the courts to counteract that pressure. One way to rehabilitate Fourth Amendment liberties is to eliminate consent searches outside the public safety context. Is this a radical proposal? I think not. This merely returns

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[129] Gouled v. United States, 255 U.S. 298, 304-06 (1921).

[130] Weeks v. United States, 232 U.S. 383, 390-91 (1914).

[131] Carroll v. United States, 267 U.S. 132, 155-56 (1925).

[132] *See* United States v. Drayton, 536 U.S. 194 (2002) (person); Illinois v. Rodriguez, 497 U.S. 177 (1990) (apartment); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (car).

[133] Florida v. Bostick, 501 U.S. 429 (1991).

us partially to the strong Fourth Amendment that we once had. To eliminate consent as a basis for police to make routine searches merely requires police to have probable cause before they search our cars, our homes and our persons. Why would *that* be a radical proposal?

III.

I have sketched two controversial proposals. I first raised the possibility that September 11 changed, hopefully for the short run, the reasonableness balance when catastrophic harm is threatened. Thus, perhaps the Fourth Amendment now tolerates a kind of "terrorist profiling" but only in limited cases and for as long as terrorists pose a credible threat against our way of life. Here, too, I think the Framers would approve. These men had faced the threat of destruction from inside or outside pretty much non-stop since the 1760s. Morgan Cloud offers two vivid examples of how a threat to the Union affects even those who believe strongly in liberty and equality.[134] His Revolutionary War example demonstrates, I believe, that the Framers of the Fourth Amendment would have accepted a procedure designed to identify the enemies who threaten to destroy us.

Indeed, the 1798 Alien Act was an early attempt to flush out enemies in our midst (principally the French and those thought connected to the French). Considered by President Adams as a war measure,[135] it gave the President the right "to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States."[136] The parallel to today's war with al Qaeda is obvious. To be sure, the Alien Act was controversial and was "passed over vigorous Jeffersonian opposition."[137] Today, we consider the Alien Act a mistake or a po-

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[134] Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369 (2003).

[135] DAVID MCCULLOUGH, JOHN ADAMS 507 (2001).

[136] Alien Act, ch. 58, 1 Stat. 570-71 (1798) (emphasis omitted).

[137] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 155

litical maneuver to rid the country of Jefferson's Republicans. The Columbia Encyclopedia flatly asserts, without citing authority, that the Alien and Sedition Acts were "designed to destroy Thomas Jefferson's Republican party."[138] But this reading, to the extent it is based on the Alien Act,[139] is, I think, too revisionist. We think the Alien Act a mistake because we know how the story turned out. That actions taken to preserve the polity are unnecessary is never so clear when one is presently faced with the loss of the country.

As recent scholarship makes plain, the fear of France was based on much more than xenophobia or paranoia whipped up by crafty Federalist politicians. When Presidents Washington and Adams refused to join the French war against Britain, the French seized over two thousand American merchant ships in "a retaliatory war of commercial plunder against America."[140] Even more ominously, word spread in 1798 that Napoleon Bonaparte had assembled an invasion force aimed at the United States.[141] "The Speaker of the House, Jonathan Dayton, speculated publicly that troops already massed in French ports were destined for America. Innumerable others thought a French invasion imminent. To oppose such an invasion, President Adams summoned General George Washington from retirement to command the United States Army."[142] Washington accepted the command reluctantly, conditioned on a series of demands, one of which was "that he should 'not be called

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(1961) (Black, J., dissenting); *see also* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 63 (2002) (noting that "the Act drew forceful opposition from such luminaries as Thomas Jefferson and James Madison"); *id.* at 84 (noting that "[d]espite the war with France, leaders of the Democratic-Republican Party vehemently opposed the Alien Act").

[138] *Alien and Sedition Acts*, *in* COLUMBIA ENCYCLOPEDIA 70 (6th ed. 2001). The Sedition Act was more controversial because it encroached on the First Amendment and gave prosecutors a weapon to use to silence critics of the Adams government.

[139] Alien Act, ch. 58, 1 Stat. at 596-97.

[140] Fehlings, *supra* note 137, at 64 (citing S. REP. No. 41-10 (1870), *reprinted in* 46 CONG. REC. 366, 377 (1910) (calculating the total at 2290)).

[141] *Id.* at 65.

[142] *Id.* at 66.

into the field' until a French invasion actually threatened."[143] A French emigre wrote in his diary during this period, "People acted as though a French invasion force might land in America at any moment. Everybody was suspicious of everybody else: everywhere one saw murderous glances."[144] Historian David McCullough, in his Pulitzer Prize-winning biography of Adams, flatly concluded that in the summer of 1798, "the United States was at war [with France]—declared or not—and there were in fact numbers of enemy agents operating in the country."[145]

As for the political motives of the Federalists, if one reads the tracts of the era—for example, *Detection of a Conspiracy Formed by the United Irishmen, with the Evident Intention of Aiding the Tyrants in France in Subverting the Government of the United States of America*[146]—it seems clear enough that these writers, at least, believed in the threat of violent overthrow of the United States government.[147] Unless these writers were lying to gain political advantage, it is simply too pat to characterize their support for the Alien Act as wholly political. It is even conceivable that the Alien Act was constitutional! Gregory Fehlings recently argued that the Court's "interpretations of the Constitution over the past two centuries strongly suggest that the statute was a valid exercise of federal power to control immigration and to wage war."[148]

As fear of foreigners subsided, the Alien Act became a "dead letter"[149] and expired by its own terms on June 25, 1800.[150] Conventional wisdom is that President Adams de-

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[143] JOHN FERLING, JOHN ADAMS: A LIFE 360 (1992).

[144] Ferling, *supra* note 143, at 67 (quoting MEDERIC LOUIS-ELIE MOREAU DE SAINT-MERY, MOREAU DE ST. MERY'S AMERICAN JOURNEY, 1793-1798, 252 (Kenneth Roberts & Anna M. Roberts trans., eds., 1947)).

[145] McCullough, *supra* note 135, at 505.

[146] Peter Porcupine, *Detection of a Conspiracy, Formed by the United Irishmen, with the Evident Intention of Aiding the Tyrants of France in Subverting the Government of the United States of America*, *in* 8 PORCUPINE'S WORKS (William Cobbett 1798) *microformed on* Early American Imprints (1st Series 48395).

[147] *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION ACTS AND AMERICAN CIVIL LIBERTIES 26 (1956); JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 192 (1951).

[148] Fehlings, *supra* note 137, at 114.

[149] Miller, *supra* note 147, at 192.

[150] *Id.* at 193; *see* Alien Act, ch. 58, 1 Stat. 572 (1798).

ported no one pursuant to the Act, though he threatened its use.[151] We may look back on the events surrounding September 11 and conclude that the al Qaeda threat was far less substantial than it now appears. We may conclude that al Qaeda was more flash than fire, that it had a genius Plan A but no equivalent Plan B (or that we disrupted its network and prevented Plan B). One can only hope. Without the benefit of a crystal ball, it would be foolish to assume a rosy outcome, but at some point, perhaps when there are democratically elected governments in the Middle East, hopefully the need for a "terrorist profile" will cease. Like the Alien Act, terrorist profiling can expire.

The second proposal that I sketched was intended to neutralize the consent acid that is destroying Fourth Amendment liberties. I proposed that, outside the context of public safety requests for consent, the Fourth Amendment should be interpreted so that a search based solely on consent is not a reasonable search. In effect, I argued that consent should be ignored as a basis for a search except when it protects the public safety. Among the salutary effects of this bold move is to remove a law enforcement method that most facilitates racial profiling. If police are required to articulate probable cause to justify searches, they will be much less likely to rely on race as a proxy for status as a likely criminal. In addition, this doctrinal move gives us back much of the Fourth Amendment that the Framers intended.

Requiring police to have probable cause before they search our persons, our cars and our homes is not, I think, too much to ask.

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[151] DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 386 (1962). Fehlings contends that "scholars have erroneously assumed the Alien Act of 1798 was not used against anyone . . ., having been misled by President John Adams's remark, made many years after expiration of the Alien Act, that the Act 'was never executed by me in any instance.'" Fehlings, *supra* note 137, at 63 n.1 (quoting Letter from John Adams to Thomas Jefferson (June 14, 1813), *in* 10 THE WORKS OF JOHN ADAMS 42 (Charles F. Adams ed., 1856)). Fehling only contends that one alien was deported under the Alien Act, and his only authority is the *Encyclopedia Britannica*. *Id.* at 105 n.216.

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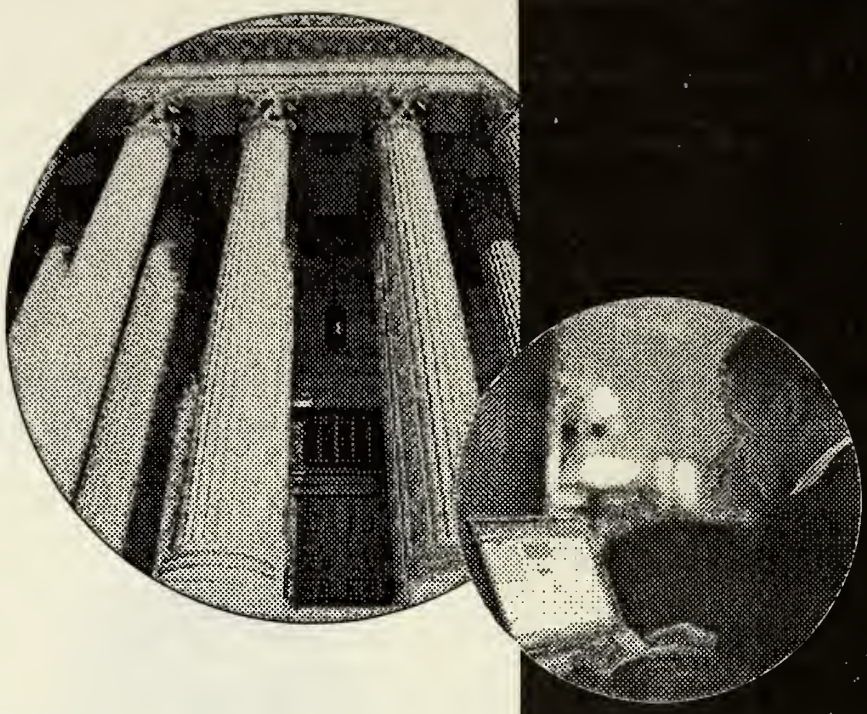

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